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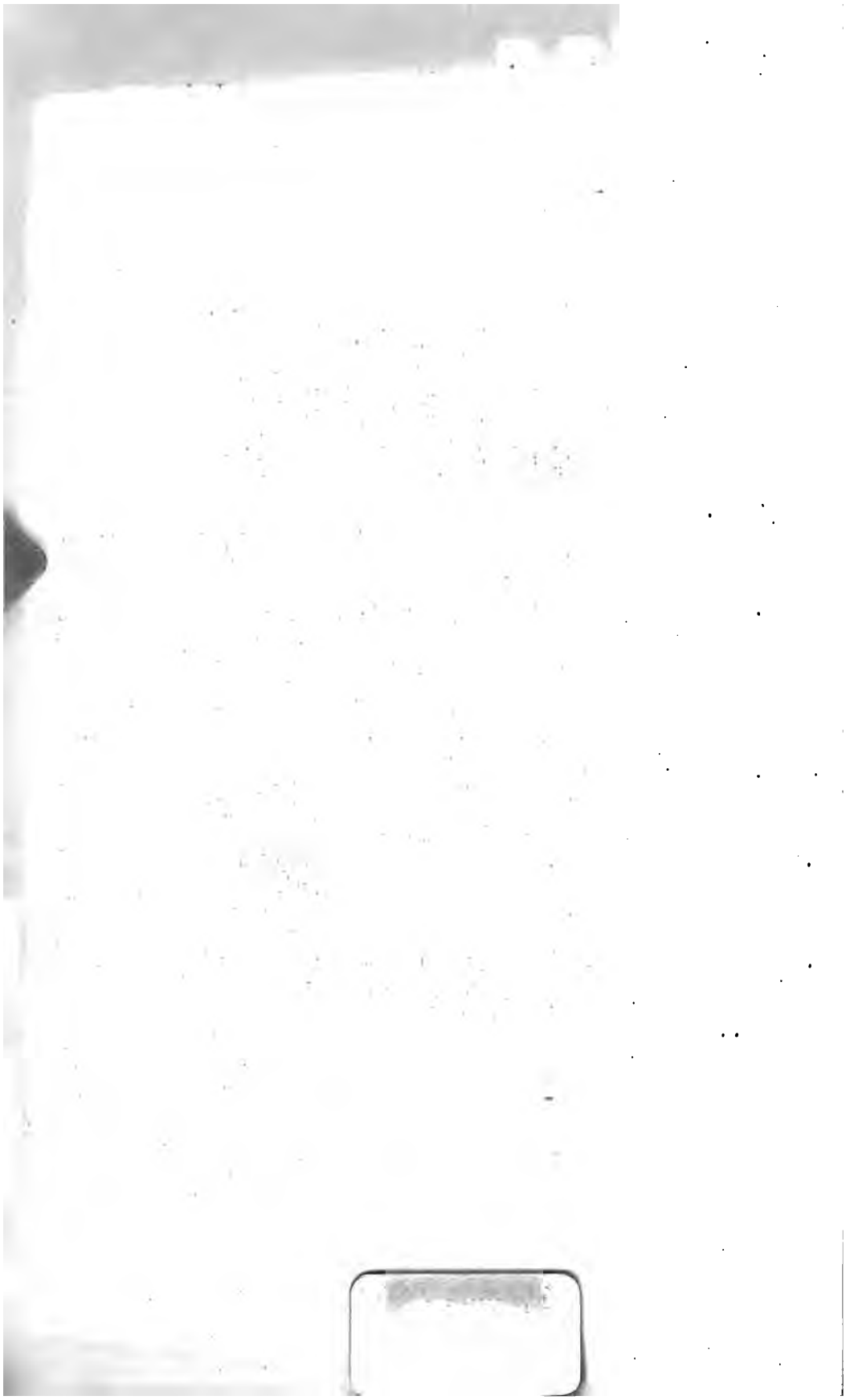

A TREATISE

ON

FEDERAL PRACTICE

INCLUDING

PRACTICE IN BANKRUPTCY, ADMIRALTY, PATENT CASES, FORECLOSURE OF RAILWAY MORTGAGES, SUITS UPON CLAIMS AGAINST THE UNITED STATES

EQUITY PLEADING AND PRACTICE, RECEIVERS AND INJUNCTIONS

IN THE STATE COURTS

BY

ROGER FOSTER,

OF THE NEW YORK BAR,

AUTHOR OF COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, TREATISES ON THE FEDERAL JUDICIARY ACTS OF 1875 AND 1887, THE FEDERAL INCOME TAX OF 1894, AND LECTURER ON FEDERAL JURISPRUDENCE AT THE LAW SCHOOL OF YALE UNIVERSITY.

THIRD EDITION

REVISED AND ENLARGED

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STATE JOURNAL PRINTING COMPANY,
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TO

The Memory of my Father,

DWIGHT FOSTER,

FORMERLY JUSTICE OF THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS,

I DEDICATE THIS BOOK

BEGUN AT HIS SUGGESTION,
ALTHOUGH HE DID NOT LIVE TO CORRECT ITS FAULTS.

PREFACE TO SECOND EDITION.

The passage of the Evarts Act creating the Circuit Courts of Appeals, which radically changed the jurisdiction and practice affecting appeals and writs of error, and the many recent decisions explaining the right to and practice in removals from the State to the Federal courts, have rendered a second edition necessary. The reception given by the bench and bar to the first edition has encouraged the author to enlarge the scope, and he hopes the usefulness of the book. Many of the original sections have been rewritten, and new sections have been added to the original chapters, including all material statutes and decisions passed or reported before the October term of 1891, and many decisions since that date which have been added while the book was in the press.

New chapters have been added, on Practice in Admiralty, by Charles C. Burlingham, Esq., of the New York bar; Practice in the Court of Private Land Claims, by ex-Judge E. A. Bowers, now of the bar of Washington, D. C.; and Practice in the Court of Claims. The chapters on Jurisdiction, Evidence, Costs, Practice at Common Law, Removal of Causes, and Writs of Error and Appeals, have been entirely rewritten and nearly doubled in size. A large number of forms and rules and a few recent statutes have been added to the Appendix. It is hoped that the book will now serve as a full guide to the practitioner in every branch of Federal practice in civil causes.

The author has been greatly aided by the Notes to the Revised Statutes by Messrs. Gould and Tucker, and by the Important Federal Statutes Annotated, by Mr. Russell H. Curtis.

The references to the Supplement to the Revised Statutes are to the first edition.

NEW YORK, January 11, 1892.

PREFACE TO THIRD EDITION.

The decisions during the nine years since the publication of the second edition of this book have made clear much that was then obscure concerning the jurisdiction of the Circuit Courts under the Judiciary Act of 1887 and of the Supreme Court and Circuit Courts of Appeals under the Evarts Act of 1891. This reason alone would have seemed to justify a new edition; but the Bankruptcy Act of 1898 made it a necessity. The entire work has been rewritten in the light of the subsequent cases and statutes. By the transfer of many instances from the text to the notes and the omission of a number of long quotations, the writer is enabled to make room for much new matter, although he has added only about three hundred pages to the book. A new chapter on Practice in Bankruptcy has been included. He has also added, wherever they seemed appropriate, references to the leading cases in the different States upon points of equity pleading and practice, including those which are still important under Codes of Civil Procedure. He hopes that the book now contains everything except a knowledge of the local rules of court that is necessary to qualify a practitioner in the courts of equity of New Jersey, Massachusetts, Delaware, Tennessee, Kentucky, Mississippi, Alabama and the District of Columbia, as well as in all the courts of the United States; besides the treatment of a number of topics such as parties, service of process by publication, multifariousness, injunctions, receivers and others equally important under Code practice.

NEW YORK, August 2, 1901.

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FEDERAL EQUITY PRACTICE.

CHAPTER I.

JURISDICTION.

§ 1. Equitable jurisdiction in general.— Equity is that system of jurisprudence which was administered by the High Court of Chancery of England in the exercise of its extraordinary jurisdiction,[1] and which has been amplified and extended by the more modern decisions of the English and American courts. It owed its origin to a desire upon the part of the English sovereigns and their chancellors to supplement the deficiencies and soften the rigors of the common law; and whereas the wellsprings of this were such of the customs of the German tribes as had been brought with them from their Fatherland by the Jutes and Angles;[2] those of that, which was administered at first exclusively by ecclesiastics, are in the canon, which was itself derived from the greatest monument of the genius of ancient Rome, the civil law.[3] Since the time of Nottingham, before whom each succeeding chancellor had decided the cases brought before him in accordance with his own notions of what was proper, or in the language of Selden,[4] measured justice out by the length of his foot, the same respect has been paid to precedent in the courts of equity and common law. But the rules regulating the remedies administered by the former are much more plastic. And even at the present time cases often occur where judges sitting at equity, with the approval and assistance of the profession, invent and adopt new remedies suited to a state of society and of civilization unknown and not anticipated when the procedure in chancery first assumed the form that it still substantially retains.[5] The chronicles of the

§ 1. [1] Mitford's Pleadings; Bispham's Equity, § 1.

[2] Holmes' Com. Law.

[3] Langdell's Eq. Pl., Introduction.

[4] Selden's Table Talk, Title "Equity."

[5] Kennedy v. St. Paul & Pacific R. Co., 2 Dill. 448; Wallace v. Loomis, 97

growth and development of equity abound with names well known to the students, as well of general history as of jurisprudence. Among them Wolsey, More, Bacon, Clarendon, Somers, and Erskine are the most familiar to the former, while the members of the profession look back with especial admiration upon the careers of Nottingham, Hardwicke, Eldon, Westbury, Kent, Story, and Taney. Although originally no one could seek their aid who was not denied justice by the courts of common law; yet after he had once shown a title to their assistance, courts of equity would almost always give a suitor complete relief in the matter about which he complained.[6] And now that since the time of Mansfield the courts of common law have, abandoning their former jealousy, in many instances of their own accord as well as under the compulsion of statutes, accepted doctrines first created by courts of equity,[7] the latter have not felt obliged to relinquish the jurisdiction which they formerly acquired.[8] One of the marked characteristics which distinguish equity from the common law, is that, while the latter, as a general rule, acts against and exercises control over property alone; has but a very limited and merely incidental power, mostly borrowed from chancery, to enforce obedience to a personal command, its procedure being founded upon the theory that the parties to an action owe no obedience to the court;[9] and is consequently restricted in its operation when the property which is the subject of a contention is beyond the reach of its process: equity acts directly against and exercises complete control over persons, and does not lose jurisdiction when the parties are subject to its process, because the property over which it thereby assumes control is beyond the territory under those laws whence its own power is derived.[10]

U. S. 146; Joy v. St. Louis, 138 U. S. 1, 50; Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co., 54 Fed. R. 746, 751; Wallworth v. Holt, 4 Mylne & Cr. 619.

[6] 1 Fonblanque's Equity, b. i, ch. i, § 8, note (*f*); Motteux v. London Assur. Co., 1 Atk. 545; Tayloe v. Merchants' Fire Ins. Co., 9 How. 390, 405.

[7] Moses v. Macferlan, 2 Burr. 1005; Dickerson v. Colgrove, 100 U. S. 578.

[8] Putnam v. New Albany, 4 Biss. 365.

[9] Langdell's Eq. Pl., § 40.

[10] Archer v. Preston, 1 Eq. Cas. Ab. 133, pl. 8, cited and followed in Arglasse v. Muschamp, 1 Vern. 75; s. c., 1 Vern. 135; Penn v. Lord Baltimore, 1 Ves. Sr. 444; Massie v. Watts, 6 Cranch, 148; Muller v. Dows, 94 U. S. 444, at pages 449–450. The authorities are well collected in a learned opinion

§ 2. General survey of the jurisdiction of courts of equity. The jurisdiction of courts of equity is exercised either for the protection of rights which the common law does not recognize; or for the prevention or redress of wrongs for which the common law affords no adequate remedy. A full consideration of this topic is beyond the scope of this treatise. The following summary, although imperfect, may occasionally assist the reader. The rights which a court of equity alone respects are: the rights of beneficiaries under a trust,[1] either express or implied,— which latter term includes those which are resulting[2] or constructive:[3] the right to be relieved from an obligation which has been entered into, or to recover a right which has been lost by accident,— which expression is said to include the cases where one has become subject to a penalty or forfeiture,[4] or has lost a document the possession of which was essential to his success in an action at common law,[5] and is also often used to bolster up a weak equity of another kind —;[6] by mistake,— which must be mutual, material, and not caused by the negligence of the party seeking relief,[7] and which, if solely of a point of law, will very rarely release one from his contract obligations —;[8] by fraud, whether actual[9] or constructive;[10]

by Judge, subsequently Chief Judge, Henry E. Davies, in Gardner v. Ogden, 22 N. Y. 327. *Cf.* Carpenter v. Strange, 141 U. S. 87, 106, cited *infra*, § 825.

§ 2. [1] Stuart v. Mellish, 2 Atk. 610; New Orleans v. Morris, 105 U. S. 600.

[2] Dyer v. Dyer, 2 Cox Eq. Cas. 92; Hoxie v. Carr, 1 Sumn. 173.

[3] National Bank v. Insurance Co., 104 U. S. 54, 64–71.

[4] 1 Spence Eq. 629, 630; Bispham's Eq., § 178. Mortgages are included under this head. Mitford's Pl. 118–276; Story's Eq. Jur., § 89.

[5] Savannah Nat. Bank v. Haskins, 101 Mass. 370; Donaldson v. Williams, 50 Mo. 408; Story's Eq. Jur., § 84; Bispham's Eq., §§ 176, 177. But not, it has been said, to assist in maintaining an action for a tort. Security S. & L. Ass'n v. Buchanan (C. C. A.), 66 Fed. R. 799.

[6] Story's Eq. Jur., §§ 90–99; Bispham's Eq., §§ 182, 188. Cases where this head of equity is invoked for relief against a defective execution of a power are included here.

[7] Bispham's Eq., § 191; Whittemore v. Farrington, 76 N. Y. 452; McFerran v. Taylor, 3 Cranch, 281; Elliott v. Sackett, 108 U. S. 132; Williams v. U. S., 138 U. S. 514; Duke of Beaufort v. Neeld, 12 Cl. & Fin. 248, at p. 286; Stephenson v. Wilson, 2 Vern. 325.

[8] Hunt v. Rousmanier's Adm'rs, 8 Wheat. 174, 215; s. c., 1 Pet. 1, 14;

[9] Cobbeltiom v. William, Chan. Cal. II; Stonehouse v. Starishaw, Chan. Cal. XXIX; Bief v. Dyer, Chan. Cal. XI; Bacon v. Bronson, 7 Johns. Ch. (N. Y.) 194; Jones v. Bolles, 9 Wall. 364.

[10] Mackreth v. Fox, 4 Bro. P. C. 258; Ex parte Lacey, 6 Ves. 625; Villa v. Rodriguez, 12 Wall. 323, 339; Adams v. Cowen, 177 U. S. 471, 484.

or by duress:[11] and the rights of those who are justly entitled to compel election under a will, or an adjustment of liabilities,[12] — under which term are included set-off,[13] contribution,[14] exoneration,[15] and marshaling of securities.[16] The cases where the jurisdiction of equity is exercised merely for the sake of the remedy are where its interposition is needed to assist in obtaining a judgment at law by compelling a discovery from a defendant,[17] or the perpetuation of the testimony of witnesses,[18] or their examination abroad,[19] when it is feared that, on account of death, illness, or absence, they cannot be obliged to attend upon the trial; in rare cases to grant a new trial;[20] to satisfy a judgment out of property of a debtor which cannot be reached by an execution;[21] to prevent a threatened breach of a right,[22] or compel the performance of a duty,[23] the commission or omission of which, respectively, would inflict

Snell v. Insurance Co., 98 U. S. 85; Pitcher v. Hennessey, 48 N. Y. 415; Adair v. Brimmer, 74 N. Y. 539; Relief F. Ins. Co. v. Shaw, 94 U. S. 574; Allen v. Galloway, 30 Fed. R. 406; Cooper v. Phibbs, L. R. 2 H. L. 170; Elliott v. Sacket, 108 U. S. 132, 142; Taylor v. Holmes, 127 U. S. 489; Pope Mfg. Co. v. Gormully, 144 U. S. 224; Pope Mfg. Co. v. Gormully & Jeffery Co., 144 U. S. 238; Griswold v. Hazard, 141 U. S. 260; Mutual Life Ins. Co. v. Phinney, 178 U. S. 327, 342; Hamblin v. Bishop, 41 Fed. R. 74; Bailey v. Am. Cent. Ry. Co., 13 Fed. R. 250; Sias v. Roger Williams Ins. Co., 8 Fed. R. 183; Sampson v. Mudge, 13 Fed. R. 260.

[11] Nicholls v. Nicholls, 1 Atk. 409; Gould v. Okeden, 4 Bro. P. C. 198; Baker v. Morton, 12 Wall. 150.

[12] Arnold v. Kempstead, 1 Amb. 466; Jones v. Collier, 2 Amb. 730; Herbert v. Wren, 7 Cranch, 370, 378.

[13] Chapman v. Derby, 2 Vern. 117; Lord Lanesborough v. Jones, 1 P. Wms. 325; 2 Story's Eq. Jur., § 1433; Story, J., in Greene v. Darling, 5 Mason, 201, 207-213; North Chicago R. M. Co. v. St. Louis O. & S. Co., 152 U. S. 596.

[14] Layer v. Nelson, 1 Vern. 456; Howards v. Selden, 5 Fed. R. 465, 473.

[15] Galton v. Hancock, 2 Atk. 425; Walker v. Jackson, 2 Atk. 625; Bank of U. S. v. Beverly, 1 How. 134, 151.

[16] Aldrich v. Cooper, 8 Ves. 394; Trimmer v. Bayne, 9 Ves. 209; 1 Story's Eq. Jur., § 633.

[17] Finch v. Finch, 2 Ves. Sr. 492; Moodalay v. Morton, 1 Bro. C. C. 469; Brown v. Swann, 10 Pet. 497, 500; Heath v. Erie Ry. Co., 9 Blatchf. 316.

[18] Earl of Suffolk v. Green, 1 Atk. 450; Pearson v. Ward, 1 Cox Eq. 177; Lord Dursley v. Berkeley, 6 Ves. 251. See U. S. R. S., §§ 863-867.

[19] Moodalay v. Morton, 1 Bro. C. C. 469.

[20] Folsom v. Ballard (C. C. A.), 70 Fed. R. 12.

[21] Angell v. Draper, 1 Vern. 399; Scottish Am. Mtg. Co. v. Follansbee, 14 Fed. R. 125.

[22] Robinson v. Lord Byron, 1 Bro. C. C. 588; Osborn v. Bank of U. S., 9 Wheat. 738.

[23] Stribley v. Hawkie, 3 Atk. 275; Huguenin v. Baseley, 15 Ves. 180; Hunt v. Rousmanier's Adm'rs, 1 Pet. 1; Willard v. Tayloe, 8 Wall. 557.

such an irreparable injury upon a person, that a judgment for damages, or the cumbrous legal process of ejectment, replevin, detinue, or account rendered,[24] would be no adequate remedy for the loss thereby occasioned; to prevent a needless multiplicity of suits;[25] and to compel the cancellation or execution of instruments,[26] the existence or want of which is a cloud upon, or an apparent flaw in, a person's title, or would render it difficult for him to resist an unjust demand, or to dispose of property by sale.

§ 3. Constitutional provisions affecting the jurisdiction of the Federal courts.— The Constitution of the United States provides that, "The judicial power" of the United States "shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of Admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States; and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects."[1] But "the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[2] "In all cases affecting Ambassadors, other public Ministers, and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction,"[3] although "such inferior Courts as the Congress may from time to time ordain and establish"[4] may also have original jurisdiction

[24] Gunn v. Brinckley C. W. & M. Co., 66 Fed. R. 382.

[25] Freeman v. Pontrell, Chan. Cal. XIII; Earl of Bath v. Sherwin, 4 Bro. P. C. 373; Woods v. Monroe, 17 Mich. 238; Cummings v. National Bank, 101 U. S. 153; Dodge v. Briggs, 27 Fed. R. 161.

[26] Pierce v. Webb & Stalker, note to Ryan v. Mackmath, 3 Bro. C. C. 15; Peake v. Highfield, 1 Russ. 559, and cases cited; Bunce v. Gallagher, 5 Blatchf. C. C. 481; Boyce v. Grundy, 3 Pet. 210.

§ 3. [1] Constitution, art. III, § 2.

[2] Eleventh Amend. to Constitution.

[3] Constitution, art. III, § 2.

[4] Ib., § 1.

thereof.[5] "In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions and under such Regulations as the Congress shall make."[6] In no other cases can it have original jurisdiction.[7]

§ 4. The distinction between law and equity in the Federal courts.— The fact that those who framed the Constitution thought it necessary to separately mention law and equity, when blocking out the jurisdiction of the Federal courts, has caused some judges to think, and even to say in their opinions, that it was thereby intended that these branches of the law should always be kept apart.[1] The better opinion, however, seems to be that this distinction between law and equity is enforced by the Constitution only to the extent to which the Seventh Amendment forbids any infringement of the right of trial by jury, as fixed by the common law.[2] Yet, although a great number of the States of the American Union, and even England itself have fused together the two systems, in the courts of the United States, while the same judges have jurisdiction in each, the common law and equity are still as distinct as they were in the time of Coke and Bacon.

§ 5. General rules affecting the jurisdiction in equity of the Federal courts.— The jurisdiction in equity of the Federal courts is, subject to the limitations of the Constitution, substantially the same as that of the English Court of Chancery;[1] although, in the absence of special statutory authority, they do not exercise those powers not judicial which were ex-

[5] Ames v. Kansas, 111 U. S. 449; Börs v. Preston, 111 U. S. 252; U. S. v. Ravara, 2 Dall. 297; Gittings v. Crawford, Taney, 1; St. Luke's Hospital v. Barclay, 3 Blatchf. 259; Graham v. Stucken, 4 Blatchf. 50.

[6] Constitution, art. III, § 2.

[7] Marbury v. Madison, 1 Cranch, 137; Ex parte Vallandigham, 1 Wall. 243.

§ 4. [1] Parsons v. Bedford, 3 Pet. 433; Bennett v. Butterworth, 11 How. 669, 674; Hipp v. Babin, 19 How. 271, at p. 277; Fenn v. Holme, 21 How. 481, 486; Costs in Civil Cases, 1 Blatchf. C. C. 652, 654; Butler v. Young, 1 Flip. 276, 278; Meade v. Beale, Taney, 339, at p. 361; Thompson v. Railroad Cos., 6 Wall. 134; Reubens v. Joel, 13 N. Y. 488, at p. 497.

[2] Mr. Justice Matthews in Root v. Railway Co., 105 U. S. 189, 206. Compare Ex parte Boyd, 105 U. S. 647.

§ 5. [1] Robinson v. Campbell, 3 Wheat. 212, at p. 221; Fenn v. Holme, 21 How. 481, at p. 484; Meade v. Beale, Taney, 339, at p. 361; Gordon v. Hobart, 2 Sumn. 401, at p. 405; Fletcher v. Morey, 2 Story, 555, at p. 567; Root v. Railway Co., 105 U. S. 189, at p. 207.

ercised over the persons and estates of infants, idiots, lunatics, and charities by the Lord Chancellor, as the representative of the sovereign and by virtue of the latter's prerogative as *parens patriæ*.[2] It was said by Chief Justice Taney that the Constitution of the United States grants only judicial power at law and in equity to its courts; that is, powers at that time understood and exercised as judicial, in the courts of common law and equity in England. "And it must be construed according to the meaning which the words used conveyed at the time of its adoption; and the grant of power cannot be enlarged by resorting to a jurisdiction which the Court of Chancery in England, centuries ago, may have claimed as a part of its ordinary judicial power, but which had been abandoned and repudiated as untenable on that ground, by the court itself, long before the Constitution was adopted."[3]

Another judge said recently: "The rule being that this equity power must be construed according to equity jurisdiction in England as exercised at the time of the adoption of the Constitution and of the judiciary act, any jurisdiction exercised by that court in its earlier history, but subsequently abandoned, and any enlargement of its jurisdiction by statute subsequent to 1789 are to be excluded."[4] Chief Justice Taney also said: that it was undoubtedly true, in regard to equitable rights, that the power of the courts of chancery of the United States is, under the Constitution, to be regulated by the law of the English chancery; that is to say, the distinction between law and equity as recognized in the jurisprudence of England is to be observed in the courts of the United States, in administering the remedy for an existing right; that the rule applies to the remedy and not the right; and it does not follow that every right given by the English law, and which at the time the Constitution was adopted might have been enforced in the Court of Chancery, can also be enforced in a court of the United States; the right

[2] Fontain v. Ravenel, 17 How. 369, at p. 391; Loring v. Marsh, 2 Clifford, 469, at p. 492; In re Barry, 42 Fed. R. 113; In re Burrus, Petitioner, 136 U. S. 586. But see the Late Corporation of The Church of Jesus Christ of Latter Day Saints v. U. S., 136 U. S. 1, 51, 56; s. c., 140 U. S. 665. As to their jurisdiction to inquire into the custody of the lunatic, see King v. McLean Asylum (C. C. A.), 64 Fed. R. 325.

[3] Taney, C. J., in Fontain v. Ravenel, 17 How. 369, 394, 395.

[4] Alger v. Anderson, 92 Fed. R. 696.

must be given by the law of the State or of the United States.[5] The Revised Statutes of the United States provide that: "Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law."[6] The Supreme Court has construed this statute substantially as follows: The effect of the provision of the Judiciary Act is that whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury.[7] "This enactment certainly means something; and if only declaratory of what was always the law, it must, at least, have been intended to emphasize the rule, and to impress it upon the attention of the courts."[8] "It would be difficult, and perhaps impossible, to state any general rule which would determine, in all cases, what should be deemed a suit in equity as distinguished from an action at law, for particular elements may enter into consideration which would take the matter from one court to the other; but this may be said, that, where an action is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law. An action for the recovery of real property, including damages for withholding it, has always been of that class."[9] Accordingly, a suit in equity to enforce a legal right can be brought only when the court can give more complete and effectual relief in kind or in degree on the equity side than on the common-law side; as, for instance, by compelling a specific performance, or the removal of a cloud on the title to real estate; or preventing an injury for which damages are not recoverable at law, as in *Watson v. Sutherland*, 5 Wall. 74; or where an agreement procured by fraud is of a continuing nature, and its rescission will prevent a multiplicity of

[5] Meade v. Beale, Taney, 339, 361.

[6] U. S. R. S., § 723.

[7] Hipp v. Babin, 19 How. 271; Insurance Co. v. Bailey, 13 Wall. 616, 621; Grand Chute v. Winegar, 15 Wall. 373, 375; Lewis v. Cocks, 23 Wall. 466, 470; Root v. Railway Co., 105 U. S. 189, 212; Killian v. Ebbinghaus, 110 U. S. 568, 573.

[8] N. Y. Guaranty Co. v. Memphis Water Co., 107 U. S. 205, 214, per Bradley, J.

[9] Whitehead v. Shattuck, 138 U. S. 146, 151, per Field, J.

suits."[10] "By inadequacy of the remedy at law is here meant, not that it fails to produce the money,—that is a very usual result in the use of all remedies,—but that in its nature or character it is not fitted or adapted to the end in view."[11] There may consequently be cases over which the English courts of chancery would have taken jurisdiction, which are not cognizable by the Federal courts when sitting at equity.[12]

Where the complainant has a remedy at law by mandamus, the fact that a Federal court has no jurisdiction to grant the mandamus does not make the remedy at law inadequate.[13] The fact that a judgment can only be enforced by application to a court of equity does not take the case from the common-law side of the court.[14]

"The adequate remedy at law which is the test of equitable jurisdiction in these courts, is that which existed when the Judiciary Act of 1789 was adopted, unless subsequently changed by Congress."[15]

A state statute giving an adequate relief at law does not affect the equitable jurisdiction of a Federal court.[16]

Whether the equitable jurisdiction is lost when a statute of the United States gives the same or adequate relief at law,—as, for example, in the case of discovery,—has not yet been settled.[17] If a statute of the United States creates a new right, the remedy will be in equity if the relief thereby afforded is in analogy with a species of relief ordinarily given by equity

[10] Buzard v. Houston, 119 U. S. 347, 351, 352, per Gray, J.

[11] Thompson v. Allen Co., 115 U. S. 550, 554, per Miller, J.

[12] Buzard v. Houston, 119 U. S. 347, 352.

[13] Smith v. Bourbon Co. 127 U. S. 105. *Contra*, Provisional Municipality of Pensacola v. Lehman, 57 Fed. R. 324, 331. As to the rule where the State courts give a remedy by *certiorari*, Ewing v. City of St. Louis, 5 Wall. 413; Taylor v. Louisville & N. R. Co., 88 Fed. R. 350, 359.

[14] Thompson v. Northern Pac. Ry. Co., 93 Fed. R. 384.

[15] McConihay v. Wright, 121 U. S. 201, 206, per Matthews, J.

[16] Missouri, K. & T. Ry. Co. v. Elliott, 56 Fed. R. 772; Mississippi Mills v. Cohn, 150 U. S. 202; Sheffield Furnace Co. v. Witherow, 149 U. S. 574; Smyth v. Ames, 169 U. S. 466; Lindsay v. First Nat. Bank, 156 U. S. 485.

[17] Compare Vaughan v. Central Pac. R. Co., 4 Sawy. 280; Pratt v. Northam, 5 Mason, 95; Peters v. Prevost, 1 Paine, 64; Home Ins. Co. v. Stanchfield, 1 Dill. 424; Markey v. Mut. Ben. Life Ins. Co., 6 Ins. L. J. 537; Heath v. Erie R. Co., 9 Blatchf. 316; Drexel v. Berney, 14 Fed. R. 268; Post v. Toledo, C. etc. R. Co., 144 Mass. 341, 4 New Eng. R. 221.

alone.[18] Thus, it has been held that a suit to enforce the individual liability of stockholders or directors to creditors of a corporation,[19] or to determine the question of the right of possession to land under section 2326 of the Revised Statutes when there are conflicting claims to patents before a land office,[20] must be brought in equity.

The proceeding under the act of Congress to prevent the unlawful occupancy of public lands[21] is a summary proceeding in the nature of a suit in equity and may be tried without a jury.[22] In the absence of express provisions to that effect, it was held that a statute directing the Attorney-General to take "proper proceedings to prevent any unlawful interference with the rights and equities of the United States under this act," and other acts of Congress, "and to have legally ascertained and firmly adjudicated all alleged rights" of persons claiming any control or interest in the property of a corporation and to have annulled all contracts beyond the corporate powers, did not authorize the joinder of applications for common-law and chancery writs in the same suit.[23]

A suit under section 5239 of the Revised Statutes to recover of a director of a national bank the damages sustained in consequence of excessive loans should be brought on the common-law side of the court.[24]

§ 6. State statutes cannot impair the jurisdiction nor regulate the practice of Federal courts of equity.— No State statute giving one of its courts — for example, a court of probate — exclusive jurisdiction of a certain class of litigation can impair

[18] Edgell v. Haywood, 3 Atk. 354; Hornor v. Henning, 93 U. S. 228; Terry v. Little, 101 U. S. 216; Manufacturing Co. v. Bradley, 105 U. S. 175; Doe v. Waterloo Min. Co., 43 Fed. R. 219.

[19] Hornor v. Henning, 93 U. S. 228; Terry v. Little, 101 U. S. 216; Manufacturing Co. v. Bradley, 105 U. S. 175; Stone v. Chisolm, 113 U. 302. But see as to the Maine statute, Alderson v. Dole (C. C. A.), 74 Fed. R. 29. Under Kansas Gen. Stat., ch. 23, the creditor may proceed at law or in equity. N. Y. Life Ins. Co. v. Beard, 80 Fed. R. 66. As to proceedings under the Texas statute, see Thomson-Houston El. Ry. Co. v. Dallas Con. Tr. Ry. Co., 54 Fed. R. 1001.

[20] Doe v. Waterloo Min. Co., 43 Fed. R. 219.

[21] 23 St. at L. 321.

[22] Cameron v. U. S., 148 U. S. 301, 304.

[23] Union Pac. Ry. Co. v. U. S., 59 Fed. R. 813.

[24] Stephens v. Overstolz, 43 Fed. R. 771.

the jurisdiction of the Federal courts.[1] No State statute enlarging the powers of courts of common law can impair the jurisdiction of a Federal court of equity.[2] No State statute diminishing or destroying an equitable remedy, or in any way regulating the practice in courts of equity, can have any effect upon the jurisdiction or practice of the Federal courts.[3] Such are statutes requiring a mortgagor to tender the debt secured by his mortgage before filing a bill to redeem the mortgaged premises;[4] requiring a bill to foreclose a mortgage given to secure a judgment to show that execution has been issued under the judgment and returned unsatisfied;[5] requiring leave to be obtained from a State court before a suit can be brought to enforce a judgment therein entered;[6] or the presentation of a claim to the comptroller before a suit can be brought against a city;[7] forbidding an injunction against the collection of illegal taxes;[8] requiring a bond to be given before an injunction can be granted;[9] or regulating the form of the security then required or the proceedings to enforce the same;[10] determining what shall constitute notice of a pending suit;[11] authorizing persons to agree upon a statement of facts, and to stipulate that the court take jurisdiction to try a cause and render

§ 6. [1] Suydam v. Broadnax, 14 Pet. 67; Hull v. Dills, 19 Fed. R. 657; Semmes v. Whitney, 50 Fed. R. 666; Hershberger v. Blewett, 55 Fed. R. 170; Heaton v. Thatcher, 59 Fed. R. 781.

[2] McConihay v. Right, 121 U. S. 201, 206, and cases cited.

[3] Boyle v. Zacharie, 6 Pet. 648; Bein v. Heath, 12 How. (U. S.) 168, 179; Noonan v. Lee, 2 Black, 499, 509; Thompson v. Railroad Cos., 6 Wall. 134; Cowles v. Mercer County, 7 Wall. 118; Payne v. Hook, 7 Wall. 425; Railway Co. v. Whitton's Adm'r, 13 Wall. 270, 285; Smith v. Railroad Co., 99 U. S. 398. But see Massachusetts B. L. Ass'n v. Lohmiller (C. C. A.), 74 Fed. R. 23. It has been said, however, that proceedings for the foreclosure of a mortgage in a Federal court should proceed upon the ordinary lines of such proceedings in the State court. Deck v. Whitman, 96 Fed. R. 878; Knickerbocker Tr. Co. v. Penacook Mfg. Co., 100 Fed. R. 814. See, however, Nalle v. Young, 160 U. S. 624.

[4] Gordon v. Hobart, 2 Sumn. 401.

[5] Dow v. Chamberlin, 5 McLean, 281.

[6] Phelps v. O'Brien County, 2 Dill. 518.

[7] Gamewell F. A. Tel. Co. v. Mayor, etc., 31 Fed. R. 312.

[8] In re Tyler, Petitioner, 149 U. S. 164, 189.

[9] Bein v. Heath, 12 How. (U. S.) 168, 178.

[10] Bein v. Heath, 12 How. (U. S.) 168; Russell v. Farley, 105 U. S. 437; Meyers v. Block, 120 U. S. 206, 211.

[11] McClaskey v. Barr, 48 Fed. R. 130, 132. But see Jones v. Smith, 40 Fed. R. 314.

a decree without pleadings;[12] authorizing an appearance of his general guardian to bind an infant not personally served with process;[13] authorizing the examination of a party before trial;[14] providing that a county can only be sued in a specified State court;[15] forbidding a foreign corporation to sue until it has complied with a statutory condition.[16] But not a statute that permitted a debtor to file a bill to compel the return or cancellation of securities for a usurious debt, without payment or the offer of payment of the amount borrowed with lawful interest.[17] A State statute providing that if by mistake a suit was brought in equity which should have been at common law there should be no abatement, but that the cause be transferred to the common-law docket, was followed in the Federal court.[18] The New York statute providing that, upon the consolidation of two corporations, suits pending by or against either shall not abate, will be followed by the Federal courts at equity, "not because the State statute is operative to regulate the practice and procedure of Federal courts in equity suits, but because, so far as the litigated life of the artificial person (properly a party to the suit when brought) is concerned, there has been no change, the only power which could destroy it having scrupulously refrained from doing so."[19]

§ 7. State laws creating new rights are enforced by Federal courts at law or equity.— If, however, the customary[1]

[12] Nickerson v. Atchison, T. & S. F. R. Co., 1 McCrary, 383. But it has been held that equitable relief may be given on the submission, upon an agreed statement of facts, of an action of *assumpsit* brought on the common-law side of the court, and a stipulation that judgment should be rendered in accordance with the opinion of the court thereupon. Knight v. Fisher, 58 Fed. R. 991.

[13] N. Y. Life Ins. Co. v. Bangs, 103 U. S. 780.

[14] Dravo v. Fabel, 132 U. S. 487.

[15] Cowles v. Mercer County, 7 Wall. 118; Lincoln County v. Luning, 133 U. S. 529. See Chicot County v. Sherwood, 148 U. S. 529; and *infra*, § 360.

[16] Bank of N. A. v. Barling, 44 Fed. R. 641; affirmed, as Barling v. Bank of N. A. (C. C. A.), 50 Fed. R. 260.

[17] Missouri, K. & Tr. Co. v. Krumseig, 172 U. S. 351. But see Matthews v. Warner, 6 Fed. R. 461, 465; affirmed without passing on this point, 113 U. S. 600.

[18] U. S. Bank v. Lyon County, 48 Fed. R. 632.

[19] Edison Electric Light Co. v. U. S. El. Light Co., 52 Fed. R. 300, 313; s. c. (C. C. A.), per Lacombe, J. See Marion Phosphate Co. v. Perry, 74 Fed. R. 425.

§ 7. [1] Neves v. Scott, 13 How. 268, 271; Gaines v. Fuentes, 92 U. S. 10, 20; Ellis v. Davis, 109 U. S. 485; Lorman v. Clarke, 2 McLean, 568, 577; Nichols v. Eaton, 91 U. S. 716, 729; Fisher v. Shropshire, 147 U. S. 133.

or statute[2] law of a State has created a new right, the Federal courts will enforce the same at law or equity, if it falls within the remedies authorized by either branch of their jurisdiction. Such are statutes giving a mortgagor or his judgment creditors a certain time within which to redeem land after a foreclosure sale;[3] authorizing a suit to set aside the probate of a will, or a will itself, for fraud;[4] authorizing a person in possession of land, and unmolested,[5] or even one out of possession of vacant land,[6] to sustain a bill to determine and quiet the title to the same; but not a State statute authorizing one out of possession of land to obtain possession of the same when occupied by another through a suit triable without a jury;[7] imposing on stockholders individual liability to the creditors of their corporations;[8] making an assessment for opening streets a lien upon abutting lands, which can be foreclosed by the city or its assignee;[9] authorizing the appointment of a receiver under certain conditions, which in the Federal courts must then also be performed;[10] authorizing a bill for a partition of an equitable claim to land the legal title to which is in the United States;[11] authorizing an injunction to be granted in a new class of cases,[12] where there is no dispute as to the legal title of the complainant, as in a taxpayer's suit;[13] empowering a guardian with the permission of the State court to mortgage his ward's

[2] Clark v. Smith, 13 Pet. 195; Fitch v. Creighton, 24 How. (U. S.) 159; Brine v. Insurance Co., 96 U. S. 627; Mills v. Scott, 99 U. S. 25; Van Norden v. Morton, 99 U. S. 378; Cummings v. National Bank, 101 U. S. 153, 157; Holland v. Challen, 110 U. S. 15; Reynolds v. Crawfordsville First Nat. Bank, 112 U. S. 405.

[3] Brine v. Insurance Co., 96 U. S. 627; Orvis v. Powell, 98 U. S. 176, 178; Connecticut Mut. L. Ins. Co. v. Cushman, 108 U. S. 51.

[4] Broderick's Will, 21 Wall. 503, 519, 520.

[5] Clark v. Smith, 13 Pet. 195.

[6] Holland v. Challen, 110 U. S. 15; Southern Pac. R. Co. v. Stanley, 49 Fed. R. 268.

[7] Whitehead v. Shattuck, 138 U. S. 146.

[8] Borland v. Haven, 37 Fed. R. 394.

[9] Fitch v. Creighton, 24 How. (U. S.) 159.

[10] Flash v. Wilkerson, 22 Fed. R. 689; Fechheimer v. Baum, 37 Fed. R. 167; T. & W. M. Co. v. Shatto, 34 Fed. R. 380. But see Scott v. Neely, 140 U. S. 106.

[11] Aspen Mining & Smelting Co. v. Rucker, 28 Fed. R. 220.

[12] Cummings v. National Bank, 101 U. S. 153, 157; Lanier v. Alison, 31 Fed. R. 100; Grether v. Wright (C. C. A.), 75 Fed. R. 742; Weidenfeld v. Sugar Run R. Co., 48 Fed. R. 615, 619. But see Davidson v. Calkins, 92 Fed. R. 230; Lehigh Valley C. Co. v. Hamblen, 23 Fed. R. 225.

[13] Seccomb v. Wurster, 83 Fed. R. 856.

estate, but not clauses providing that such a mortgage can only be foreclosed in the court which authorized its execution;[14] creating and providing for the enforcement of a mechanic's lien;[15] authorizing a court of equity after the destruction of the public records to enter a decree establishing and confirming the title of a landowner;[16] authorizing the assignee of an insolvent to apply for the dissolution of levies of attachments and executions against his property;[17] and a vendor's lien recognized by the State common law.[18] It has been held that the Federal courts in Ohio should follow the State statute authorizing a decree of specific performance against a non-resident not served within the State, provided that jurisdiction is obtained under the Revised Statutes of the United States;[19] that the summary method of foreclosing a mortgage under the Louisiana Code belongs on the equity side of the court;[20] and that the Louisiana statute authorizing a summary proceeding to set aside an incorrect assessment for taxation will be enforced pursuant to the chancery practice on the equity side of the court, and not in accordance with the State practice by a petition upon the common-law side.[21] A State statute cannot give a Federal court jurisdiction in equity of a case in which there is an adequate remedy at common law.[22] Thus, a State statute cannot authorize a bill in equity in a Federal court to obtain possession of land held adversely to complainant;[23] but

[14] Davis v. James, 2 Fed. R. 618.

[15] Idaho & O. L. I. Co. v. Bradbury, 132 U. S. 509; Sheffield Furnace Co. v. Witherow, 149 U. S. 574, 579. But see as to attorney's lien, Sherry v. O. S. N. Co., 72 Fed. R. 565.

[16] Gormley v. Clark, 134 U. S. 338.

[17] Brochon v. Wilson, 91 Fed. R. 617.

[18] Fisher v. Shropshire, 147 U. S. 133; Chilton v. Braiden's Adm'x, 2 Black, 458.

[19] Single v. Scott Paper Mfg. Co., 55 Fed. R. 553, 557. The United States Circuit Court for the District of Connecticut followed the State statute, providing that "Courts of equity may pass the title to real estate by decree without any act of the respondent, . . . and such decree when recorded shall be as effectual as the deed of respondent." A. & W. Sprague Mfg. Co. v. Hoyt, 29 Fed. R. 421. See *infra*, § 849.

[20] Fleitas v. Richardson, 147 U. S. 538.

[21] Lindsay v. First Nat. Bank, 156 U. S. 485.

[22] Whitehead v. Shattuck, 138 U. S. 146; Scott v. Neely, 140 U. S. 106.

[23] Whitehead v. Shattuck, 138 U. S. 146; Wehrman v. Conklin, 155 U. S. 314, 325. It has been held that the bill is demurrable when it fails to allege affirmatively either that the plaintiff is in possession, or that both complainant and defendant are out of possession. So. Pac. R. Co. v. Goodrich, 57 Fed. R. 879. See Wehrman v. Conklin, 155 U. S. 315.

where neither party is in possession, the State statute might be followed.[24] A Federal court will not follow a State statute which authorizes a creditor's bill against an individual[25] or a corporation,[26] even against a stockholder where no accounting is required,[27] by a complainant who has not obtained a judgment establishing his claim; but a State statute was followed which gave such a remedy to the creditor of an insolvent decedent.[28] Whether a mortgagee must sue at law or in equity to recover from one who by a covenant with the mortgagor has assumed the mortgage depends upon the State law of the forum, not on the law of the place where the deed and mortgage were made and the land is situated.[29] When a State statute creating a new liability provides an exclusive remedy, such liability can be enforced in the Federal courts in no other manner.[30] When a State statute creates a new liability and provides that it can only be enforced in a specified State tribunal, the Federal courts will enforce the liability, and reject the clause respecting the exclusive jurisdiction.[31]

§ 8. **State statutes of limitation.**— Federal courts of equity usually follow by analogy State statutes of limitation,[1] especially in foreclosure suits[2] and suits against executors and administrators;[3] but, at least when their jurisdiction is not concurrent with courts of law,[4] they do not consider themselves

[24] Holland v. Challen, 110 U. S. 15; Harding v. Guice (C. C. A.), 80 Fed. R. 162.

[25] Scott v. Neely, 140 U. S. 106; Cates v. Allen, 149 U. S. 451. The Federal court in that State refused to follow a statute of Virginia which gave the complainant in a creditor's bill a priority over other creditors of the same class. Talley v. Curtain (C. C. A.), 54 Fed. R. 43.

[26] Morrow Shoe Mfg. Co. v. New Eng. Shoe Co., 60 Fed. R. 341; Atlantic & F. R. Co. v. Western Ry. Co. (C. C. A.), 50 Fed. R. 790.

[27] Alderson v. Dole (C. C. A.), 74 Fed. R. 29.

[28] Lilienthal v. Drucklieb (C. C. A.), 92 Fed. R. 753.

[29] Willard v. Wood, 135 U. S. 309.

[30] Fourth Nat. Bank v. Francklyn, 120 U. S. 747; Flour City Nat. Bank v. Wechselberg, 45 Fed. R. 547.

[31] Davis v. James, 2 Fed. R. 618.

§ 8. [1] Wagner v. Baird, 7 How. 234, 258; Broderick's Will, 21 Wall. 503; Godden v. Kimmell, 99 U. S. 201; Meath v. Phillips County, 108 U. S. 553; Kirby v. L. S. & M. S. R. Co., 120 U. S. 130; Pratt v. Northam, 5 Mason, 95, 112, per Story, J.; Norris v. Haggin, 136 U. S. 386.

[2] Cleveland Ins. Co. v. Reed, 1 Biss. 180; Reeves v. Vinacke, 1 McCrary, 213, 217, per Nelson and Dillon, JJ.

[3] Pulliam v. Pulliam, 10 Fed. R. 53; Broderick's Will, 21 Wall. 503.

[4] Wagner v. Baird, 7 How. 234, 258; Godden v. Kimmell, 99 U. S. 201.

bound by such statutes.[5] It has been said that a Federal court of equity will never follow a State statute of limitation when thereby manifest wrong and injustice would be wrought.[6] A State statute of limitation cannot bar the United States;[7] but the United States may take advantage of a State statute of limitations.[8] The rule that a State is not affected by laches or a statute of limitation cannot aid a creditor of a State when suing one of its debtors.[9] Otherwise the courts of the United States, in actions at common law not founded upon Federal statutes, are bound by State statutes of limitation.[10] The effect of such a statute upon actions at common law to enforce rights created by Federal statutes, such as patents and copyrights, was for a long time the subject of conflicting adjudications.[11]

A recent case held that actions at common law for the infringement of letters patent were, before Congress had legislated upon the subject, barred by the statute of the State where the Federal court was held.[12] Since then a statute has been passed providing that "in any suit or action brought for the infringement of any patent, there shall be no recovery of profits or damages for any infringement committed more than six years before the filing of the bill of complaint or the issuing of the writ in such suit or action, and this provision shall apply to existing causes of action."[13] It has been also held that the State statutes of limitation apply to actions upon judgments of courts of the United States, provided that they do not discriminate in favor of judgments of a State court;[14] and that

[5] Kirby v. L. S. & M. S. R. Co., 120 U. S. 130, 137; Etting v. Marx's Ex'r, 4 Fed. R. 673; Stevens v. Sharp, 6 Sawy. 993; Continental Nat. Bank v. Heilman, 81 Fed. R. 86. Especially in cases of fraud. McIntire v. Pryor, 173 U. S. 38; Saxlehner v. Eisner & M. Co., 179 U. S. 19.

[6] Fogg v. St. Louis, H. & K. R. Co., 17 Fed. R. 871, 873; Story's Eq. Jur., § 1521.

[7] U. S. v. Thompson, 98 U. S. 486; U. S. v. Nashville, C. & St. L. Ry. Co., 118 U. S. 120; U. S. v. Beebe, 127 U. S. 338; U. S. v. Insley, 130 U. S. 263; U. S. v. Wallamet & C. M. Wagon Road Co., 42 Fed. R. 851.

[8] Stanley v. Schwalby, 147 U. S. 508.

[9] Cressey v. Meyer, 138 U. S. 525.

[10] U. S. R. S., § 721; McCluny v. Silliman, 3 Pet. 270; Amy v. Dubuque, 98 U. S. 470.

[11] See the second edition of this treatise, p. 72.

[12] Campbell v. Haverhill, 155 U. S. 610.

[13] 54th Congress, Sess. III, ch. 391; 29 St. at L. 694.

[14] Metcalf v. Watertown, 153 U. S. 671.

in the absence of such discrimination they apply to suits against Federal officers founded upon their official acts.[15]

§ 9. Property in the custody of a State court.— A court of the United States, through a spirit of judicial comity, will usually refuse to interfere with property in the custody of a State court.[1] Conversely, it will not tolerate interference by a State court with property over which it has taken jurisdiction.[2]

It has been said that "the forbearance which courts of coordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between State courts and those of the United States, it is something more. It is a principle of right and of law, and therefore of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same place; and when one takes into its jurisdiction a specific thing, that is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void."[3] "This rule, in its application to Federal and State courts, being the outgrowth of necessity, is a principle of right and of law, which leaves nothing to the dis-

[15] McCluny v. Silliman, 3 Pet. 270, 277; Andreae v. Redfield, 98 U. S. 225; Barney v. Oelricks, 138 U. S. 529. See also Beatty's Adm'r v. Burne's Adm'rs, 8 Cranch, 98, 107, 108; Campbell v. Haverhill, 155 U. S. 610, 620.

§ 9. [1] Hagan v. Lucas, 10 Pet. 400; Taylor v. Carryl, 20 How. 583; Peale v. Phipps, 14 How. 368; Levi v. Columbia Ins. Co., 1 Fed. R. 206; Hubbard v. Bellew, 3 Fed. R. 447; Union Mut. Life Ins. Co. v. University of Chicago, 6 Fed. R. 443; Hutchinson v. Green, 6 Fed. R. 833, 836–839; Hamilton v. Chouteau, 6 Fed. R. 339; Heidritter v. Elizabeth Oil-cloth Co., 112 U. S. 294. But see Dwight v. Central Vermont R. Co., 9 Fed. R. 785.

[2] Freeman v. Howe, 24 How. 450; Heidritter v. Elizabeth Oil-cloth Co., 112 U. S. 294; Sharon v. Terry, 36 Fed. R. 337; Covell v. Heyman, 111 U. S. 176; In re Tyler, 149 U. S. 164, 186; White v. Schloerb, 178 U. S. 542.

[3] Mr. Justice Matthews in Covell v. Heyman, 111 U. S. 176, 182, approved in Re Tyler, 149 U. S. 164, 186, per Fuller, C. J. The question is one of jurisdiction. Shields v. Coleman, 157 U. S. 168.

cretion of a court, and may not be varied to suit the convenience of litigants."[4]

Even where the custody of the State court has been acquired through fraud, the Federal court will usually not interfere so long as the former retains its hold upon the property.[5] It has been held that after the trial of an action at common law it is too late to raise this objection to the jurisdiction.[6] But where the trustee elected by the creditors of an insolvent had failed to claim property until after a levy thereupon under a Federal judgment, on his intervention a decree was entered setting aside the levy, upon his payment of the costs of the same and filing an order of the State court authorizing him to take possession.[7]

The possession of an assignee appointed by an insolvent in a voluntary assignment was held not to be the possession of a State court, although in pursuance of a State statute he had filed a bond and a petition for the settlement of his accounts, praying also for instructions concerning his administration; and the Federal court consequently can appoint a receiver of property thus assigned.[8] In a case where a State court has taken possession of property covered by an insolvent's assignment, a Federal court may entertain a bill to establish a claim against it, but it may not attempt by process against the property to enforce such claim after it had been established[9] nor appoint a receiver.[10]

After a State court of probate has commenced the administration of the assets of a decedent, a Federal court may establish a debt against the estate,[11] and direct the payment by the personal representative or his sureties of such debt,[12] or of a

[4] Thayer, J., in Merritt v. American Steel-Barge Co., 79 Fed. R. 228, 231.

[5] Attleborough Nat. Bank v. N. W. Mfg. & C. Co., 28 Fed. R. 118.

[6] Gilman v. Perkins, 7 Fed. R. 887. See Erwin v. Lowry, 7 How. 172; Mo. Pac. R. Co. v. Fitzgerald, 160 U. S. 556.

[7] Geilinger v. Philippi, 133 U. S. 246, 257.

[8] Powers et al. v. Blue Grass B. & L. Ass'n, 86 Fed. R. 705. *Cf.* Adler v. Ecker, 2 Fed. R. 126; The James Roy, 59 Fed. R. 784; George T. Smith, etc. Co. v. McGroarty, 136 U. S. 237; Swofford Bros. D. G. Co. v. Mills, 86 Fed. R. 556. But see Edwards v. Hill (C. C. A.), 59 Fed. R. 723, 726; Peale v. Phipps, 14 How. 368.

[9] Edwards v. Hill (C. C. A.), 59 Fed. R. 723, 726. *Cf.* Wheelwright v. St. Louis, N. O. & O. C. & Tr. Co., 50 Fed. R. 709, and *infra*, note 20.

[10] Val. Blatz Brewing Co. v. Walsh, 84 Fed. R. 5.

[11] Yonley v. Lavender, 21 Wall. 276; Hess v. Reynolds, 113 U. S. 73.

[12] Ibid. See also Erwin v. Lowry, 7 How. 172.

legacy or of a distributive share,[13] and it may thus adjudicate upon the construction of a will,[14] and compel an accounting by an executor or administrator.[15] But a Federal court cannot issue an execution against an estate [16] or direct the distribution of all the assets held by an executor or administrator,[17] at least so far as to affect the rights of the creditors or legatees who are citizens of the same State as the defendants and who have no right to seek the Federal jurisdiction. In a case where the executors disagreed and could not act together, a Federal court appointed a receiver of the decedent's assets.[18] And a Federal court has determined the liability of a decedent's estate to pay an assessment levied after his death upon the stock of a national bank held by his executors.[19]

In the case of a receivership, no court except that which appointed the receiver can interfere with the property over which he has been appointed.[20] A State receiver cannot, except possibly in a suit for the infringement of a patent, be sued without the permission of his court.[21] And if he refuses to sue upon a claim belonging to his estate, no person interested can bring a suit to collect the same without his joinder as a defendant by the permission of such court.[22] Property in the possession of a statutory receiver not appointed by a court is not usually

[13] Payne v. Hook, 7 Wall. 425; Byers v. McAuley, 149 U. S. 608.

[14] Byers v. McAuley, 149 U. S. 608.

[15] Payne v. Hook, 7 Wall. 425. See Comstock v. Herron, 55 Fed. R. 803.

[16] Yonley v. Lavender, 21 Wall. 276; Williams v. Benedict, 8 How. 107, 112. As to attachments see Lant v. Manley (C. C. A.), 75 Fed. R. 627.

[17] Byers v. McAuley, 149 U. S. 608. But see dissent. It has been held that a Federal court will not entertain a bill in equity to set aside a sale of stocks made by executors and to take the proceeds out of their possession. Jordan v. Taylor, 98 Fed. R. 643.

[18] Ball v. Tomkins, 41 Fed. R. 486. See *infra*, § 240.

[19] Wickham v. Hull, 60 Fed. R. 826; In re Connaway, Receiver, 178 U. S. 421.

[20] In re Tyler, 149 U. S. 164; Porter v. Sabin, 149 U. S. 473. It has been held that a Federal court may foreclose a mortgage upon property held by a receiver appointed by a State court in a suit to which the mortgagee was not a party; and that in such foreclosure suit the Federal court can determine the claim of the holders of receivers' certificates issued under the order of the State court to a preference over the mortgage. Metropolitan Tr. Co. v. Lake Cities El. Ry. Co., 100 Fed. R. 897. *Cf.* Jenks v. Brewster, 96 Fed. R. 625, and *supra*, note 9; *infra*, § 251.

[21] Porter v. Sabin, 149 U. S. 473; Rejall v. Greenhood, 60 Fed. R. 784. But see *infra*, note 50, and § 251.

[22] Porter v. Sabin, 149 U. S. 473; *infra*, § 251.

considered to be in the court's custody.[23] The entire property of a corporation is not in the custody of a court that has appointed a receiver over the assets of another corporation which owns a majority of its stock and operates its railroad under a lease; and consequently a State court may appoint a receiver of the lessor after the appointment by a Federal court of a receiver of the lessee and stockholder.[24] Formerly a Federal receiver could not be sued without the permission of his court.[25] The Judiciary Act of 1887 abrogated this rule;[26] but a judgment against him cannot be enforced without the permission of the Federal court.[27] A State court cannot levy an attachment or garnishee process against a debt pending an action in a Federal court to collect the same.[28] Where a State court has attached a debt before the appointment of a receiver of the creditor by the court of another State, the Federal court directed that judgment be entered against the receiver in an action by him to collect the debt unless he should consent to a stay of proceedings until the State court had acted upon the matter.[29] A Federal receiver will not be ordered to take possession of property upon which a State court has levied an attachment before his appointment was prayed.[30]

[23] In re Chetwood, 165 U. S. 443. Where the receiver of a national bank appointed by the Comptroller of the Currency refuses to sue to collect a cause of action due the bank, one of the stockholders may sue in a State court to collect such assets on behalf of the bank, and should make the bank and its receiver parties defendant. Ibid. After the appointment by the Comptroller of the receiver of a bank, the State court may levy a writ of attachment against the bank and the receiver as garnishees. The State court then has jurisdiction to enter a judgment establishing the claim, but not to order the receiver to make a payment out of the assets of the bank. It is the duty of the receiver upon the service of the writ to report the facts to the Comptroller, and it then becomes the duty of the Comptroller to hold any funds coming to his hands through the Treasurer as the proceeds of the assets subject to any rights that have been adjudicated by the State court. Earle v. Conway, 178 U. S. 456; Earle v. Pennsylvania, 178 U. S. 449.

[24] Central R. & B. Co. v. Farmers' L. & T. Co., 56 Fed. R. 857.

[25] Barton v. Barbour, 104 U. S. 126.

[26] 25 St. at L. 866, § 3, p. 436; *infra*, § 251.

[27] Porter v. Sabin, 149 U. S. 473; Mo. Pac. Ry. Co. v. Texas Pac. Ry. Co., 41 Fed. R. 311, 314; *infra*, § 251.

[28] Wallace v. McConnell, 13 Pet. 136; Rosenstein v. Tarr, 51 Fed. R. 368; Mack v. Winslow, 59 Fed. R. 316.

[29] Avery v. Boston S. D. & T. Co., 72 Fed. R. 700. See Hale v. Bugg, 82 Fed. R. 33.

[30] Southern B. & T. Co. v. Folsom (C. C. A.), 75 Fed. R. 929.

Where there is a dispute between the State sheriff and the United States marshal as to the right to possession, the proper remedy is ordinarily a petition of intervention *pro interesse suo* by the sheriff in the Federal action.[31] It has been held that an original bill for an injunction will not lie.[32] But an ancillary bill has been sustained in such a case, and it was then said in some cases a summary motion might be granted according to the circumstances.[33] In order to preserve his right to a priority, it seems that the proper course is for the sheriff to serve upon the marshal as garnishee a notice of his writ.[34] A writ of replevin issued by a State court in such a case is void.[35]

The property of a debtor taken into the custody of a Federal court by seizure under process issued under its judgment remains under its control to be applied in satisfaction thereof, notwithstanding the death or insolvency of the judgment debtor and the institution of proceedings in a State court to administer his estate, and irrespective of subsequent State legislation.[36]

This doctrine does not prevent the removal to the Federal court in a proper case of a suit in which a State court has appointed a receiver,[37] or taken property into its possession under a common-law writ;[38] nor the filing of a bill to set aside or stay proceedings under a judgment or decree of a State court;[39] nor a bill to set aside a fraudulent transfer of property made

[31] Pickett v. Tiler & S. Co., 40 Fed. R. 313; Gambel v. Pitkin, 124 U. S. 131. See Freeman v. Howe, 24 How. 45; People's Bank v. Calhoun, 102 U. S. 256; Beckett v. Sheriff of Harford Co., 21 Fed. R. 32.

[32] Pickett v. Tiler & S. Co., 40 Fed. R. 313.

[33] Krippendorf v. Hyde, 110 U. S. 276, 287, per Matthews, J. See Porter v. Davidson, 62 Fed. R. 626.

[34] Gambel v. Pitkin, 124 U. S. 132.

[35] Freeman v. Howe, 24 How. 450; Summers v. White (C. C. A.), 71 Fed. R. 106. It has been held that when a Federal court cannot issue a writ to take property from the possession of a sheriff, it may entertain a suit against him for damages caused by an illegal levy. Porter v. Davidson, 62 Fed. R. 626.

[36] Rio Grande R. Co. v. Gomila, 132 U. S. 478, 481; Leadville Coal Co. v. McCreery, 141 U. S. 475; Straine v. Bradford Sav. B. & T. Co., 88 Fed. R. 571.

[37] In re Iowa & Minn. Constr. Co., 10 Fed. R. 401.

[38] Kern v. Huidekoper, 103 U. S. 485, 491, 492.

[39] Gaines v. Fuentes, 92 U. S. 10; Barrow v. Hunton, 99 U. S. 80, 83; Sahlgard v. Kennedy, 2 Fed. R. 295; Arrowsmith v. Gleason, 129 U. S. 86; Marshall v. Holmes, 141 U. S. 589; Robb v. Vos, 155 U. S. 13. But see Central Nat. Bank v. Stevens, 169 U. S. 432; *infra*, § 21.

by an administratrix under the order of a court of probate;[40] nor a bill to set aside a settlement of an administrator's account made by a probate court;[41] nor a suit to foreclose a mortgage or to establish a lien upon property in a State court's custody,[42] provided that no sale is ordered until the proceedings in the State court are terminated;[43] and that neither the sheriff, nor, without the permission of the court, a State receiver is a necessary party to the suit.[44] Nor does it prevent an action *in personam* between the same parties involving the same issues, provided that the property is not seized therein.[45] The rule does not apply where the Federal courts exercise superior jurisdiction for the purpose of enforcing the supremacy of the Constitution and laws of the United States.[46] Property is deemed to be in the custody of a court from the time when a suit or action seeking to have it placed there has been actually begun: either by the levy of a writ in a proceeding *in rem*,[47] or by the filing of a bill praying the appointment of a receiver,[48] or by an adjudication of bankruptcy.[49] It was held that the appointment of a State receiver who had not filed the statutory bond nor taken possession was no bar to the seizure of a boat by the marshal under process in admiralty.[50] Where

[40] Central Nat. Bank v. Fitzgerald, 94 Fed. R. 16.

[41] Bertha Z. & M. Co. v. Vaughan, 88 Fed. R. 566.

[42] Gates v. Bucki, 58 Fed. R. 961, 968; Edwards v. Hill, 59 Fed. R. 728; Wheelwright v. St. Louis, N. O. & O. C. & T. Co., 50 Fed. R. 709, 711. But see Cohen v. Solomon, 66 Fed. R. 411.

[43] Wheelwright v. St. Louis, N. O. & O. C. & T. Co., 50 Fed. R. 709, 711. But see Erwin v. Lowry, 7 How. 172.

[44] Porter v. Sabin, 149 U. S. 473.

[45] Merritt v. American S. B. Co., 79 Fed. R. 228; Rejall v. Greenhood, 60 Fed. R. 784. *Cf.* Huntington v. Laidley, 176 U. S. 668. But see *infra*, § 129.

[46] Tefft v. Sternberg, 40 Fed. R. 2, 6, per Speer, J., citing Covell v. Heyman, 111 U. S. 176. See Moran v. Sturges, 154 U. S. 256, 284.

[47] Taylor v. Carryl, 20 How. 583; Heidritter v. Elizabeth Oil-cloth Co., 112 U. S. 294.

[48] Farmers' L. & T. Co. v. Lake St. El. R. Co., 177 U. S. 51. See Bridgeport El. & I. Co. v. Meader (C. C. A.), 72 Fed. R. 115; Appleton Waterworks Co. v. Central T. Co., 93 Fed. R. 286; Shields v. Coleman, 157 U. S. 168, 177.

[49] White v. Schloerb, 178 U. S. 542.

[50] Moran v. Sturges, 154 U. S. 256. See also De La Vergne R. M. Co. v. Palmetto Br. Co., 72 Fed. R. 579; Woodbury v. Allegheny & K. R. Co., 72 Fed. R. 871. It has been held that a vessel operated by a State receiver can be seized in a foreign State by the United States District Court in admiralty there held upon a libel to enforce a claim which arose during his management of the vessel. The Willamette Valley (C. C. A.), 66 Fed. R. 565; s. c., Chandler v. The Willamette Valley, 63 Fed. R. 130. *Cf.* Roxbury v. The Lotta, 65 Fed. R. 319. It seems, however, that a court

the sheriff held, property under summary proceedings for a foreclosure under the Georgia statute, it was held to be in the custody of a State court.[51] But it was held that property was not put in the custody of a State court by the institution of a suit to establish and enforce a lien thereupon, when no actual possession had been taken.[52]

Property continues in the custody of the State courts until the cause is practically terminated, or the custody finally abandoned, although it has been held that a formal order of termination is not indispensable.[53] After a Federal court had discharged a receivership and surrendered the property in return for a bond given in lieu of the same, it was held that the State court might appoint a receiver, and that it was improper for the Circuit Court of the United States to vacate its order of discharge and claim possession by virtue of its prior receivership.[54] The discharge of a Federal receivership before the appointment of a State receiver was held to validate the latter, although made in a suit instituted during the pendency of the Federal receivership.[55] It has been held that the sheriff may seize property while still in the possession of the United States marshal after an order by the Federal court directing its return to its owner.[56]

Where suits are pending in a State and a Federal court to enforce the same cause of action, the usual practice is to stay proceedings in the court where the second case was commenced until the first is determined; not to dismiss the second suit.[57] But a bill against an administrator which sought

of admiralty in the same district cannot take possession of a vessel held by a State receiver in a proceeding to enforce a claim which arose before the receiver's appointment. The J. G. Chapman, 62 Fed. R. 939; Kressel v. E. L. Cain, 45 Fed. R. 367.

[51] Tefft v. Sternberg, 40 Fed. R. 2.

[52] Compton v. Jesup, 68 Fed. R. 263, 283.

[53] Buck v. Piedmont & A. L. Ins. Co., 4 Fed. R. 849; Andrews v. Smith, 5 Fed. R. 833; Lake Nat. Bank v. Wolfeborough Sav. Bank (C. C. A.), 78 Fed. R. 517; Foster v. Lebanon Springs R. Co., 100 Fed. R. 543. But see Shields v. Coleman, 157 U. S. 168, 181; Missouri Pac. R. Co. v. Fitzgerald, 160 U. S. 556.

[54] Shields v. Coleman, 157 U. S. 168, 178, 179. But see Union T. Co. v. Rockford, R. I. & St. L. R. Co., 6 Biss. 197. As to the effect of such a bond when jurisdiction was first acquired by the State court, see Southern B. & T. Co. v. Folsom, 75 Fed. R. 929.

[55] Liggett v. Glenn, 51 Fed. R. 881.

[56] Daniels v. Lazarus, 65 Fed. R. 718; Lazarus v. McCarthy, 32 N. Y. Supp. 833.

[57] Hughes v. Green (C. C. A.), 84

to interfere with assets in the custody of a State court of probate was held to be demurrable.[58]

It has been said that "when a State court and a court of the United States may each take jurisdiction of a matter, the tribunal where jurisdiction first attaches holds it to the exclusion of the other, until its duty is fully performed and the jurisdiction involved is exhausted, and this rule applies alone in both civil and criminal cases."[59] Thus, the Federal courts ordinarily refuse to discharge by *habeas corpus* before his trial, and even in some cases before he has exhausted his remedy by writ of error or appeal, after conviction, a prisoner held under indictment by a State court.[60] So, where the marshal had seized under a charge of a crime against the United States a prisoner held by the sheriff under a charge of a violation of the State criminal law, the Federal court upon a plea in abatement sustained the indictment found by its own grand jury, but ordered that the accused be returned to the State authorities.[61] Conversely, a State court has no power to release by *habeas corpus* a prisoner held under the process of a court of the United States.[62] The acts of Congress, however, authorize in certain cases the removal of criminal proceedings from a State to a Federal court.[63]

The institution of a proceeding in bankruptcy gives jurisdiction to the District Court of the United States to take from the custody of a State court in certain cases property seized by it within four months before the filing of the petition.[64] A District Court of the United States will enjoin a suit in a State

Fed. R. 833; Zimmerman v. So Relle, 80 Fed. R. 417; *infra*, § 129. See U. S. v. Belknap, 73 Fed. R. 19.

[58] Lant v. Manley, 71 Fed. R. 7; reversed on another point, s. c. (C. C. A.), 75 Fed. R. 627.

[59] Harkrader v. Wadley, 172 U. S. 148, 164, per Shiras, J., citing Ex parte Crouch, 112 U. S. 178.

[60] Ex parte Royall, 117 U. S. 241, 254; *infra*, § 367. A Federal court can discharge by *habeas corpus* a marshal or deputy marshal who has been arrested under State process in a criminal proceeding to punish him for an act done in obedience to an order of a Federal court or an executive department of the United States. In re Neagle, 135 U. S. 1; Anderson v. Elliott (C. C. A.), 101 Fed. R. 609.

[61] U. S. v. Wells, 11 Am. Law Reg. (N. S.) 424; s. c., Fed. Cases No. 16,665.

[62] Ableman v. Booth, 21 How. 506. See Tarble's Case, 13 Wall. 397; Robb v. Connolly, 111 U. S. 624; In the Matter of Spangler, 11 Mich. 298.

[63] U. S. R. S., §§ 641, 643; 18 St. at L., p. 401; Tennessee v. Davis, 100 U. S. 257; *infra*, §§ 383, 388, 389.

[64] 30 St. at L., p. 564. See chapter on Bankruptcy Practice, *infra*.

court commenced subsequent to an adjudication of bankruptcy to take possession of property held by the bankrupt or his trustee.[65]

§ 10. Property in the custody of another Federal court.— The different Circuit Courts of the United States, acting upon the principle of judicial comity, usually, when property has been taken into the custody of another Circuit Court, or when proceedings have been instituted therein for such a purpose, refuse to interfere with the same. Thus, where proceedings to cancel a mortgage had been instituted in one district, the Circuit Court of another district stayed proceedings upon a bill therein filed for the foreclosure of such mortgage until the determination of the first suit.[1] So, where a receiver has been appointed to take possession of certain property, such as a railroad, which is situated in several districts, it is the usual practice for the Circuit Courts in the other districts to appoint the same person as ancillary receiver of the property within their territorial jurisdiction;[2] to treat the court in which the proceedings were first instituted as that of primary jurisdiction and of principal decree, and to make the administration of the property in the latter court ancillary thereto.[3] Accordingly, the court of ancillary jurisdiction refused to direct the payment of a judgment against the corporation recovered in a State court within its district where an account of the funds in its receiver's hands was necessary, and referred the petitioner to the court of primary jurisdiction for relief.[4] This rule, however, is largely within the discretion of each Circuit Court, and cases have arisen in which each court has administered the assets within its jurisdiction independently of the administration of the court of primary jurisdiction.[5]

[65] White v. Schloerb, 178 U. S. 542.

§ 10. [1] Hurd v. Moiles, 28 Fed. R. 897.

[2] Williams v. Hintermeister, 26 Fed. R. 889; Parsons v. Charter Oak L. I. Co., 31 Fed. R. 305; *infra*, § 242.

[3] Farmers' L. & T. Co. v. Northern Pac. Ry. Co., 72 Fed. R. 26, 30, 31; Clyde v. Richmond & D. R. Co., 65 Fed. R. 336.

[4] Central T. Co. v. East Tenn., Va. & G. R. Co., 30 Fed. R. 895.

[5] The Wabash Cases: Atkins v. Wabash, St. L. & P. Ry. Co., 29 Fed. R. 161; Central T. Co. v. Wabash, St. L. & P. Ry. Co., 29 Fed. R. 618; U. S. T. Co. v. Wabash, St. L. & P. Ry. Co., 42 Fed. R. 348. See also Mercantile T. Co. v. Kanawha & O. Ry. Co., 39 Fed. R. 337; Central T. Co. v. East Tenn., Va. & G. Ry. Co., 69 Fed. R. 658; N. Y. Security & T. Co. v. Equitable Mtg. Co., 71 Fed. R. 556; Reynolds v. Stockton, 140 U. S. 254, 272; *infra*, § 242.

Where the trustees of a second mortgage on a railroad had begun a foreclosure suit, making the trustee of the first mortgage a party, and receivers had been appointed and taken possession, it was held that the first mortgagee should not be allowed to bring an independent foreclosure suit, but must seek the relief he wished in the suit instituted by the second mortgagee.[6]

So, where a prisoner is held under the criminal process of one court of the United States or of a Territorial court, or other court created by Congress, it seems that he cannot lawfully be arrested under the authority of another Federal court until the final determination of the first proceeding in which he was first seized and taken into custody.[7]

§ 11. Illustrations of equitable jurisdiction in the Federal courts.—The following instances where Federal courts of equity have assumed, and where they have refused to take jurisdiction in equity, the subject-matter and the parties being within their jurisdiction, although by no means exhaustive, may be useful to the practitioner. It has been held that bills in equity will be sustained when filed by the United States to determine a controversy as to the boundaries between a State and a Territory;[1] to compel the cancellation of illegal contracts between a railroad company and a telegraph company, when legal proceedings were authorized by statute;[2] to enforce their priority of payment out of a trust fund;[3] to cancel a land patent,[4] or a patent for an invention[5] which had been obtained by fraud,[6] or a land patent which had been by a mistake of law issued in violation of a statute,[7] or, it seems, a certificate of naturalization obtained by fraud.[8] By a municipal corporation to enjoin

[6] Mercantile T. Co. v. Atlantic & P. R. Co., 70 Fed. R. 518.

[7] In re Johnson, 167 U. S. 120, 125.

§ 11. [1] U. S. v. State, 143 U. S. 621.

[2] U. S. v. Union Pac. Ry. Co., 160 U. S. 1.

[3] Hunter v. U. S., 5 Pet. 172.

[4] Moffat v. U. S., 112 U. S. 24; U. S. v. Trinidad Coal & Coke Co., 137 U. S. 160.

[5] U. S. v. Am. Bell Telephone Co., 128 U. S. 315; U. S. v. Gunning, 18 Fed. R. 511; s. c., 23 Fed. R. 653; Noble v. Union River Logging R. Co., 147 U. S. 165.

[6] Moffat v. U. S., 112 U. S. 24; U. S. v. Gunning, 18 Fed. R. 511; s. c., 23 Fed. R. 653.

[7] Mullan v. U. S., 118 U. S. 271; McLaughlin v. U. S., 107 U. S. 526; Western Pac. R. Co. v. U. S., 108 U. S. 510. See U. S. v. Reed, 53 Fed. R. 405.

[8] U. S. v. Norsch, 42 Fed. R. 417.

the sale on execution of property held by it in trust.[9] To enjoin the head of a department of the national government from acting beyond the scope of his authority to the prejudice of the complainant.[10] By a legatee against an executor[11] and by one of the next of kin against an administrator and his sureties,[12] to recover the complainant's share of a decedent's estate. By a married woman to recover money which belongs to her separate estate.[13] By a single man to have declared null and void a paper purporting to be a marriage contract executed by him.[14] To set aside a contract obtained by fraud.[15] To set aside a land patent issued in violation of a statute.[16] To reform an instrument executed by mistake.[17] To set aside a conveyance obtained for a grossly inadequate consideration from a man in a state of intoxication, partly caused by the acts of the defendant.[18] By the beneficiary of a trust against his trustee and a debtor of the trust estate.[19] By the holder of a corporate bond or other claim to enforce his lien upon tolls or other income pledged to secure its payment.[20] By a stockholder in a corporation to recover its money fraudulently misappropriated by its directors.[21] By a stockholder against a corporation to compel the transfer of stock fraudulently transferred to another;[22] and to compel the transfer of stock to its equitable owner,[23] unless it has been acquired unconscientiously or for speculative purposes,[24] or perhaps when the stock is of a kind that can be readily bought in open market.[25] To compel specific performance of a

[9] New Orleans v. Morris, 105 U. S. 600.

[10] Noble v. Union River Logging R. Co., 147 U. S. 165.

[11] Mayer v. Foulkrod, 4 Wash. C. C. 349. So may an executor to establish his individual claim against the estate. Glover v. Patten, 165 U. S. 394.

[12] Payne v. Hook, 7 Wall. 425; Pratt v. Northam, 5 Mason, 95.

[13] Hunt v. Danforth, 2 Curt. 592.

[14] Sharon v. Hill, 20 Fed. R. 1.

[15] Boyce v. Grundy, 3 Pet. 210.

[16] Southern Pac. R. Co. v. Wiggs, 43 Fed. R. 333.

[17] Walden v. Skinner, 101 U. S. 577.

[18] Thackrah v. Haas, 119 U. S. 499.

[19] U. S. v. Myers, 2 Brock. 516.

[20] Good Templars' L. Ass'n v. United L. I. Ass'n, 59 Fed. R. 220; Grand Trunk Ry. Co. v. Central Vt. Ry. Co., 85 Fed. R. 87. See Townsend v. Vanderwerker, 160 U. S. 171; Vallette v. White W. V. C. Co., 4 McLean, 192.

[21] Gindrat v. Dane, 4 Cliff. 260.

[22] Kilgour v. N. O. Gas-Light Co., 2 Woods, 144.

[23] Mechanics' Bank v. Seton, 1 Pet. 299.

[24] Mississippi & Mo. R. Co. v. Cromwell, 91 U. S. 643; Foll's Appeal, 91 Pa. St. 434, 438; Randolph's Ex'r v. Quidnick Co., 135 U. S. 457.

[25] Ross v. Union Pac. Ry. Co.,

contract for the sale of a patent-right.[26] To compel specific performance of a contract to issue an insurance policy, and in the same suit to compel payment of the policy.[27] In Virginia, by a creditor of an insolvent firm which is disposing of its assets in fraud of creditors, filed on behalf of the other creditors as well as himself, and praying the appointment of a receiver, an injunction against any interference by others with the firm assets and the distribution of those assets among the creditors equally.[28] By a trustee and his beneficiary to obtain possession of land subject to the trust.[29] To recover from a bank money of the plaintiff deposited by a third person in the latter's name.[30] To enjoin a township from setting up, as a defense to an action upon bonds issued by it, the accidental omission of the town seal thereon.[31] By a judgment creditor against a city for an accounting of taxes collected by it which had been pledged for the payment of complainant's demand.[32] To enforce a decree for the payment of money, at least when made by another court of equity.[33] To set aside an invalid tax deed, or a deed executed under a decree of a court which had no jurisdiction over the matter, when the invalidity or want of jurisdiction must be made to appear by facts not apparent upon the deed itself.[34] To enforce the payment of alimony directed to be paid in the final judgment or decree of a State court.[35] To set aside a judgment obtained by accident, mistake, or fraud.[36] To set aside an award by arbitrators upon allegations of misconduct not apparent on the face of the award, nor affecting the jurisdiction of the arbitrators.[37] By a creditor of a decedent to set

1 Woolw. 26, 33; Fallon v. Railroad Co., 1 Dill. 121. But see Wilson v. Atlantic & St. L. R. Co., 2 Fed. R. 459.

[26] Hall v. Pitrat, 45 Fed. R. 94.

[27] Tayloe v. Merchants' F. Ins. Co., 9 How. 390; Hebert v. Mutual L. Ins. Co., 12 Fed. R. 807; Brugger v. State Inv. Ins. Co., 5 Saw. 304.

[28] Fink v. Patterson, 21 Fed. R. 602.

[29] Harrison v. Rowan, 4 Wash. C. C. 202.

[30] Union S. Y. Bank v. Gillespie, 137 U. S. 411, 420; National Bank v. Insurance Co., 104 U. S. 54.

[31] Bernards Township v. Stebbins, 109 U. S. 341.

[32] City of New Orleans v. Fisher (C. C. A.), 91 Fed. R. 574. See *infra*, § 12, notes 6, 7, 8, 9.

[33] Shields v. Thomas, 18 How. 253, 262. But see Tilford v. Oakley, Hempst. 197.

[34] Ritchie v. Sayers, 100 Fed. R. 520. But see Little Rock Junction Co. v. Burke (C. C. A.), 66 Fed. R. 83; Morrison v. Marker, 93 Fed. R. 692.

[35] Barber v. Barber, 21 How. 582; Knapp v. Knapp, 59 Fed. R. 641. *Cf.* Johnson v. Johnson, 13 Fed. R. 193; Bowman v. Bowman, 30 Fed. R. 849.

[36] Metcalf v. Williams, 104 U. S. 93, 95.

[37] Hartford F. Ins. Co. v. Bonnet Mercantile Co., 44 Fed. R. 151, 156.

aside a fraudulent conveyance of his estate made after his death by the order of a court.[38] By a judgment creditor to apply to the satisfaction of his debt any interest which his debtor may hold in a patent or copyright,[39] or in a license to use a patented invention.[40] In the absence of any statutory restrictions, by a resident taxpayer in a county to prevent an illegal disposition of the county funds, or the illegal creation of a debt which he in common with the other property holders there may be compelled to pay.[41] In certain cases, by a landowner to prevent an assessment for betterment under an unconstitutional statute.[42] For an injunction against irremediable injury to property pending an action of ejectment, although filed by a party out of possession.[43] To set aside and to declare null and void a municipal ordinance which impairs the operation of a contract with the complainants, when the invalidity of the ordinance does not appear upon its face, but must be proved by evidence *aliunde*, and it is a cloud upon the title of the complainants to a franchise.[44] To compel the assignment to a principal by his agent of judgments recovered by the latter for the benefit of the former.[45] Under special circumstances, to compel specific performance of a lease of a railroad or line of electric wire and a guaranty of the covenants therein contained,[46] and of an agreement to allow a telegraph company to use a railway track on equitable terms.[47] By a corporation, and in special cases by its stockholders and by its mortgagee, to enjoin a State railroad commission and other State officers from executing an order unauthorized by law or an unconstitutional statute.[48] To enjoin a State board of

[38] Johnson v. Waters, 111 U. S. 640.

[39] Ager v. Murray, 105 U. S. 126. See Maitland v. Gibson, 79 Fed. R. 136, cited *infra*, §§ 21, 96, 349*a*, 880. Whether a Federal court will entertain a creditor's bill founded upon the judgment of a State court within the district has been doubted. Davis v. Davis, 65 Fed. R. 380. But that it can be was held in Bacon v. Harris, 62 Fed. R. 99; Bidwell v. Huff, 103 Fed. R. 362.

[40] Matthews v. Green, 19 Fed. R. 649.

[41] Field, J., in Crampton v. Zabriskie 101 U. S. 601, 609.

[42] Wilson v. Lambert, 168 U. S. 611.

[43] Erhardt v. Boaro, 113 U. S. 537.

[44] Los Angeles v. Los Angeles C. Water Co., 177 U. S. 558, 568, 580.

[45] Burke v. Davis, 63 Fed. R. 456.

[46] Pennsylvania R. Co. v. St. L., A. & T. H. R. Co., 118 U. S. 290; St. Louis, A. & T. H. R. Co. v. I. & St. L. R. Co., 9 Biss. 144.

[47] Franklin Tel. Co. v. Harrison, 145 U. S. 459.

[48] Smyth v. Ames, 169 U. S. 466; Dinsmore v. Southern Exp. Co., 92 Fed. R. 714; Reagan v. Farmers' L. & T. Co., 154 U. S. 362. But see *infra*, § 37.

equalization from certifying to the different counties an assessment of a railroad for taxation at a higher percentage of its real value than the assessment of other property by the county officers, although the board had assessed the railroad at no more than its value, and the State Constitution ordained that all property be taxed according to its value, when, if the complainant was remitted to its remedy at law, a cloud would be cast upon its title and it would be obliged to bring at least thirty-five suits to obtain relief.[49]

To compel an accounting by persons standing in a trust relation to the plaintiff,[50] and by those against whom an action for account render would lie at common law,[51] namely, guardians in socage, bailiffs, receivers, and merchants in their dealings with each other;[52] but not otherwise,[53] unless the accounts are mutual or very complicated and intricate,[54] or the accounting is supplemental to some other equitable relief.[55] For example, an account will not be decreed against the infringer of a patent upon a bill filed after the term of the patent has expired;[56] but a bill filed only a few days before the expiration of a patent may be sustained, if it is possible to obtain equitable relief during the life of the patent,[57] unless under the prac-

[49] Taylor v. Louisville & N. R. Co. (C. C. A.), 88 Fed. R. 350, 356, 358. *Cf.* Sanford v. Poe (C. C. A.), 69 Fed. R. 546; Ogden City v. Armstrong, 168 U. S. 224. See *infra*, § 12.

[50] Pacific R. of Mo. v. Atlantic & Pac. R. Co., 20 Fed. R. 277; Fowle v. Lawrason, 5 Pet. 494, 502; Littlefield v. Perry, 21 Wall. 205.

[51] Mitchell v. Manufacturing Co., 2 Story, 648; Linson v. Hutton, 98 U. S. 79; Fowle v. Lawrason, 5 Pet. 494, 502; U. S. v. National Bank, 73 Fed. R. 379.

[52] Bispham's Equity, sec. 481; 1 Co. Litt. 90 b; 1 Co. Litt. 172 a; Bacon's Abr., Account, A.; Buller's Nisi Prius, 127; Earl of Devonshire's Case, 11 Coke, 89.

[53] Root v. Railway Co., 105 U. S. 189; Consol. Safety Valve Co. v. Ashton Valve Co., 26 Fed. R. 319; Lord v. Whitehead, etc. Mach. Co., 24 Fed. R. 801; Gunn v. Brinckley Car Works & Mfg. Co., 66 Fed. R. 382.

[54] Kilbourn v. Sutherland, 130 U. S. 505; John Crossley Sons v. New Orleans, 20 Fed. R. 352; Pacific R. Co. v. Atlantic & Pac. R. Co., 20 Fed. R. 277; Gunn v. Brinckley C. W. & Mfg. Co. (C. C. A.), 66 Fed. R. 382; Baker v. Biddle, Bald. 394; Blakeley v. Biscoe, Hempst. 114; Kilbourn v. Sutherland, 130 U. S. 505. But see Lord v. Whitehead, etc. Mach. Co., 24 Fed. R. 801; Adams v. Bridgewater Iron Co., 26 Fed. R. 324; Hagenbeck v. Hagenbeck Zoo. A. Co., 59 Fed. R. 14.

[55] Rubber Co. v. Goodyear, 9 Wall. 788; Root v. Railway Co., 105 U. S. 189.

[56] Root v. Railway Co., 105 U. S. 189; Brooks v. Miller, 28 Fed. R. 615, 617.

[57] Beedle v. Bennett, 122 U. S. 71; Clark v. Wooster, 119 U. S. 322, 324;

tice of the court no injunction could possibly have been obtained before the expiration of the patent;[58] and also, perhaps, even when the bill has been filed after the expiration of the patent, if the infringing articles were made during its life.[59] Since imported goods in the custody of the collector cannot be replevied,[60] a bill in equity may be maintained to recover their possession.[61]

The Revised Statutes provide that "Whenever a patent on application is refused, either by the Commissioner of Patents or by the Supreme Court of the District of Columbia upon appeal from the Commissioner, the applicant may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the Commissioner to issue such patent on the applicant filing in the patent-office a copy of the adjudication, and otherwise complying with the requirements of law. In all cases, where there is no opposing party, a copy of the bill shall be served on the Commissioner; and all the expenses of the proceeding shall be paid by the applicant, whether the final decision is in his favor or not."[62] It has been held that the bill cannot be brought until the determination of an ap-

Westinghouse Air Brake Co. v. Carpenter, 32 Fed. R. 484, per Brewer, J.; Kittle v. De Graaf, 30 Fed. R. 689, per Coxe, J.; Adams v. Bridgewater Iron Co., 26 Fed. R. 824; Brooks v. Miller, 28 Fed. R. 615, 617; Russell v. Kern (C. C. A.), 69 Fed. R. 94.

[58] Clark v. Wooster, 119 U. S. 322, 324; American Cable Ry. Co. v. Citizens' Ry. Co., 44 Fed. R. 484; Keyes v. Eureka Con. Mfg. Co., 45 Fed. R. 199; American Cable Ry. Co. v. Chicago City Ry. Co., 41 Fed. R. 522; Russell v. Kern (C. C. A.), 64 Fed. R. 581; s. c., 69 Fed. R. 94; McDonald v. Miller, 84 Fed. R. 344.

[59] N. Y. Belting & Packing Co. v. Magowan, 27 Fed. R. 111; citing Root v. Railway Co., 105 U. S. 189; American D. R. B. Co. v. Rutland Marble Co., 2 Fed. R. 856; American D. R. B. Co. v. Sheldon, 1 Fed. R. 870; Crossley v. Derby Gas Light Co., 4 L. J. Ch. (N. S.) 25. But see Westinghouse v. Carpenter, 48 Fed. R. 894, and *infra*, §§ 216, 236.

[60] U. S. R. S., § 934.

[61] Pollard v. Reardon, 65 Fed. R. 848.

[62] U. S. R. S., § 4915; 27 St. at L. 434; Runstetler v. Atkinson, 23 Off. Gaz. 1025; Greeley v. Commissioner, 6 Fisher, 675; s. c., 1 Holmes, 284; Ex parte Arkell, 15 Blatchf. 437; Butterworth v. Hill, 114 U. S. 128; Hill v. Wooster, 132 U. S. 693.

peal to the District Court of Appeals;[63] and that the statute authorizing the appeal to the District Court of Appeals is constitutional.[64] The Commissioner of Patents is not a necessary party when there is a party to oppose the bill,[65] but when the patent has been issued and assigned, the assignee is a necessary party.[66] It has been held that the statute does not authorize an injunction against the issue of a patent by the Commissioner to some one other than the plaintiff.[67] A bill for an account of general average and decree of contribution has been sustained.[68] It has been held that there is jurisdiction in equity to open a closed account, although there is a remedy at law, in a case where, were the accounts still open, equity might have entertained a bill for an accounting.[69] "It is possible that one who holds land under grant from the United States, who has done everything in his power to entitle him to a patent (which he cannot compel the United States to issue to him), and is deemed the legal owner, so far as to render the land taxable to him by the State in which it lies, may be considered as having sufficient title to sustain a bill in equity to quiet his right and possession."[70]

§ 12. Illustrations of cases where the Federal courts have refused to assume equitable jurisdiction.— Equity will not entertain a bill to restrain the President of the United States from carrying into effect an unconstitutional act of Congress, in the discharge of duties "purely executive and political."[1] Nor a bill to protect rights which are purely political, even though rights of property may be thereby incidentally affected.[2] Nor a bill to enforce an "abstract right" which the complainant asserts, and which he may never practically exercise; as,

[63] Smith v. Muller, 75 Fed. R. 612.

[64] U. S. v. Duell, 172 U. S. 576.

[65] Butler v. Shaw, 21 Fed. R. 321; Graham v. Teter, 25 Fed. R. 555.

[66] Graham v. Teter, 25 Fed. R. 555. See Illingworth v. Atha, 42 Fed. R. 141, 145.

[67] Illingworth v. Atha, 42 Fed. R. 141, 144.

[68] Sturgess v. Cary, 2 Curt. 59.

[69] Bischoffsheim v. Baltzer, 20 Fed. R. 890.

[70] Gray, J., in Frost v. Spitley, 121 U. S. 552, 556, citing Carroll v. Safford, 3 How. 441, 463; Van Wyck v. Knevals, 106 U. S. 360, 370; Van Brocklin v. Tennessee, 117 U. S. 151, 169.

§ 12. [1] Mississippi v. Johnson, 4 Wall. 475.

[2] Georgia v. Stanton, 6 Wall. 50. *Cf.* Georgia v. Grant, 6 Wall. 241; Clough v. Curtis, 134 U. S. 361; Smith v. Board County Com'rs Skogit County, 45 Fed. R. 725; Mills v. Green, 69 Fed. R. 852.

for example, the right to remove an obstruction from a navigable river, when he does not allege that he is about to navigate the same.[3] Nor a bill by the United States to enjoin a corporation from opening an exhibition upon Sunday, where Congress had made an appropriation toward the expense of the enterprise upon the express condition that it should be closed on the first day of each week.[4] Nor a bill by a coupon-holder, who does not allege that he is a taxpayer, to enjoin a State officer from refusing to receive his coupons in payment of taxes, as is required by a contract between the coupon-holder and the State.[5] Nor a bill to compel municipal, county or State officers to levy a tax;[6] or to issue bonds, even in the case of a contract;[7] since the remedy, when it exists at all, is by mandamus. Nor a bill for the appointment of a receiver to levy taxes, or to collect taxes previously levied.[8] Nor a bill to enjoin an insolvent municipality from expending its funds for other municipal purposes.[9] Nor a bill to enjoin the collection of an internal revenue tax imposed by the United States and illegally assessed.[10] Nor a bill to restrain the collection of a State tax, no matter how illegally imposed,[11] unless its enforcement would lead to a multiplicity of suits,[12] or produce

[3] Spooner v. McConnell, 1 McLean, 337.

[4] World's Columbian Exposition v. U. S., 56 Fed. R. 654.

[5] Marye v. Parsons, 114 U. S. 325. See Parsons v. Slaughter, 63 Fed. R. 876.

[6] Walkley v. Muscatine, 6 Wall. 481.

[7] Smith v. Bourbon County, 127 U. S. 105.

[8] Rees v. Watertown, 19 Wall. 107; Heine v. Levee Com'rs, 19 Wall. 655; Meriwether v. Garrett, 102 U. S. 472.

[9] Thompson v. Allen County, 115 U. S. 550. See *supra*, § 11, note 32; Safe Deposit & T. Co. v. City of Anniston, 96 Fed. R. 661, 663, per Shelby, J.: "If the remedy at law is adequate in theory it deprives equity of jurisdiction, although practically it may be inadequate to secure the collection of the claim sued on."

[10] U. S. R. S., § 3224; Snyder v. Marks, 109 U. S. 189. But see Pollock v. Farmers' L. & T. Co., 157 U. S. 429; *supra*, § 11.

[11] Hannewinkle v. Georgetown, 15 Wall. 548; Dows v. Chicago, 11 Wall. 108; State Railroad Tax Cases, 92 U. S. 575; Milwaukee v. Koeffler, 116 U. S. 219; Pittsburg, etc. Ry. Co. v. Board of Public Works, 172 U. S. 32.

[12] Union Pac. Ry. Co. v. Cheyenne, 113 U. S. 516; Dundee Mtge. T. Invt. Co. v. School District, 19 Fed. R. 359; Cummings v. National Bank, 101 U. S. 153, 156; Taylor v. Louisville & N. R. Co. (C. C. A.), 88 Fed. R. 350, 357; Sanford v. Poe (C. C. A.), 69 Fed. R. 546. "It is real and not imaginary suits, it is probable and not possible danger of a multiplicity of suits, that will warrant the assumption of jurisdiction on that ground. While it is true, as the plaintiff contends, that

irreparable injury,[13] or throw a cloud upon the title of real estate,[14] or possibly when its assessment was made by a fraud of which equity would take cognizance, or when there is at law no means of recovering its amount.[15] Nor a bill to compel a railway company to maintain its permanent terminus at a certain place.[16] Nor, except perhaps under special circumstances, to compel a railroad company to compel specific performance by either party to a contract for the construction of a railroad.[17] Nor solely for purposes that could be accomplished by an action in ejectment.[18] Nor to quiet the title to real estate when the complainant's rights are purely equitable;[19] nor, in the absence of a State statute authorizing such a

the State might bring a separate suit for each day's penalty" for failure to pay a tax, "the court would hardly be justified in acting on the assumption that it would do so. The State is not to be looked upon in the light of a barrator, and the court will not impute to it, or to its officers acting in its name, a litigious or vindictive spirit, or a purpose needlessly to vex and harass the citizen with lawsuits. Whatever the rule may be in the case of natural persons, the court will presume that a State is incapable of such a vulgar passion, and, until the fact is shown to be otherwise, will act on the assumption that a State will not bring any more suits than are fairly necessary to establish and maintain its rights." Pacific Exp. Co. v. Seibert, 44 Fed. R. 310, 315, per Caldwell, J.

[13] See Taylor v. Louisville & N. R. Co. (C. C. A.), 82 Fed. R. 350.

[14] Sanford v. Gregg, 58 Fed. R. 620; Taylor v. Louisville & N. R. Co. (C. C. A.), 82 Fed. R. 350, 358.

[15] First Nat. Bank v. Douglass County, 3 Dill. 298; Union Pac. R. Co. v. McShane, 3 Dill. 303, 312. In Shelton v. Platt, 139 U. S. 591, 596, 597, where the only jurisdictional averments were "that the property of the United States Express Company in Tennessee is employed in interstate commerce in the said express business, and necessary to the conduct of it; that if seized by the said sheriff it will greatly embarrass the company in the conduct of such business, and subject it to heavy loss and damage, and the public served by it to great loss and inconvenience;" and "that your orator and the United States Express Company are without adequate remedy at law in the premises;" it was held that no injunction should issue." See Allen v. Pullman's Palace Car Co., 139 U. S. 658. See also Keithsburg Bridge Co. v. McKay, 42 Fed. R. 427; Pacific Exp. Co. v. Seibert, 44 Fed. R. 310; Hoey v. Coleman, 46 Fed. R. 221, 223.

[16] Texas & Pac. Ry. Co. v. Marshall, 136 U. S. 393.

[17] Strang v. Richmond, P. & C. R. Co., 93 Fed. R. 71. See also Fallon v. Railroad Co., 1 Dill. 121; Ross v. Union Pac. Ry. Co., 1 Woolw. 26.

[18] Hipp v. Babin, 19 How. 271; Lewis v. Cocks, 23 Wall. 466; Ellis v. Davis, 109 U. S. 485; Killian v. Ebbinghaus, 110 U. S. 568; U. S. v. Wilson, 118 U. S. 86; Speigle v. Meredith, 4 Biss. 120.

[19] Frost v. Spitley, 121 U. S. 552.

suit, when he is not in possession of the land.[20] Nor a bill for a partition filed by a tenant in common out of possession;[21] or where the complainant's title is denied;[22] except when the complainant's title is not recognized at common law.[23] Nor, usually, to restrain the seizure or to compel the return of personal property,[24] unless its loss by the owner would result in irreparable injury by the destruction of his business and commercial credit,[25] or by rendering it impossible for him to manage his farm,[26] or on account of its unique value,[27] or if it be held in trust.[28] That the value of the property is so great that the complainant is unable to give the bond required in an action of replevin affords no ground for the interference of equity.[29] Nor can a bill be sustained which seeks to recover damages for a conversion,[30] or for a fraudulent misrepresentation,[31] even when sought as an alternative to a prayer for a rescission,[32] or for a fraudulent conspiracy.[33] Nor to collect a note from its maker[34] or an indorsee.[35] Nor to collect the amount of an insurance policy.[36] Nor a bill filed by an insurance company, after a loss has occurred, to obtain the cancellation of a policy procured by fraud.[37] Nor, except in a very

[20] U. S. v. Wilson, 118 U. S. 86; Frost v. Spitley, 121 U. S. 552; *supra*, § 7.

[21] Frey v. Willoughby, 68 Fed. R. 865.

[22] American Ass'n v. Eastern Ky. Land Co., 68 Fed. R. 721. But see Fuller v. Montague, 59 Fed. R. 212.

[23] Hopkins v Grimshaw, 165 U. S. 342, 358.

[24] Knox v. Smith, 4 How. 298; Van Norden v. Morton, 99 U. S. 378. But see Crane v. McCoy, 1 Bond, 422.

[25] Watson v. Sutherland, 5 Wall. 74; North v. Peters, 138 U. S. 271.

[26] Breeden v. Lee, 2 Hughes, 484.

[27] Pusey v. Pusey, 1 Vern. 273; Duke of Somerset v. Cookson, 3 P. Wms. 389. But see Lawrence v. Times Printing Co., 90 Fed. R. 24.

[28] New Orleans v. Morris, 105 U. S. 600; Reynes v. Dumont, 130 U. S. 354.

[29] In re Oregon Iron Works, 4 Saw. 169, 170; s. c., 17 N. B. R. 404.

[30] Dumont v. Fry, 12 Fed. R. 21.

[31] Russell v. Clark, 7 Cranch, 69; White v. Boyce, 21 Fed. R. 228. "In cases of fraud and mistake, as under any other head of chancery jurisdiction, a court of the United States will not sustain a bill in equity to obtain only a decree for the payment of money by way of damages, when the like amount can be recovered in an action sounding in tort or for money had and received." Per Gray, J., in Buzard v. Houston, 119 U. S. 347, 352.

[32] Alger v. Anderson, 92 Fed. R. 696.

[33] Ambler v. Choteau, 107 U. S. 586.

[34] Dowell v. Mitchell, 105 U. S. 430.

[35] Shields v. Barrow, 17 How. 130.

[36] Graves v. Boston Marine Ins. Co., 2 Cranch, 419.

[37] Home Ins. Co. v. Stanchfield, 1 Dill. 424; Insurance Co. v. Bailey, 13 Wall. 616.

extraordinary case, a bill to enjoin slanders or libels.[38] Nor a bill to enjoin criminal proceedings.[39] Nor a bill to enjoin the removal of an officer of the United States or of a State or a municipality,[40] or the enactment of a municipal ordinance,[41] except perhaps when the ordinance would impose a municipal indebtedness.[42] Nor a bill to compel a public officer to perform a ministerial duty.[43] Nor a bill by the assignee of a cause of action to enforce for his own use the legal right of his assignor, when he seeks the aid of equity merely upon the ground that he cannot maintain an action at law in his own name.[44] Nor a bill by a private citizen to set aside a land-patent of the United States, on account of fraud upon the government used in its procurement,[45] although if fraud were then practiced upon the plaintiff he might have relief upon the ground of estoppel.[46] Nor a bill filed by a creditor for himself alone to apply equitable assets to the payment of his debt, unless he has obtained a judgment for his claim in a court of the same State or judicial district, and had the return of an execution issued thereon unsatisfied;[47] not even, it has been held, when it is shown that the debtor is insolvent, and has no property which can be reached by legal process,[48] unless to enforce a trust or equitable right.[49] Nor, in the absence of a State statute authorizing such a proceeding, a bill to set aside the probate of a will,[50] or to cancel a will itself,[51] on account of a mistake,

[38] Francis v. Flinn, 118 U. S. 385; Baltimore Car Wheel Co. v. Bemis, 29 Fed. R. 95. *Contra*, Emack v. Kane, 34 Fed. R. 46; Fougeres v. Murbarger, 44 Fed. R. 292. See § 223.

[39] Harkrader v. Wadley, 172 U. S. 148; Fitts v. McGhee, 172 U. S. 516.

[40] In re Sawyer, 124 U. S. 200; White v. Berry, 171 U. S. 366, 376–378.

[41] New Orleans Water Works Co. v. New Orleans, 164 U. S. 471. But see Los Angeles v. Los Angeles Water Co., 177 U. S. 558; *supra*, § 11.

[42] Murphy v. East Portland, 42 Fed. R. 808.

[43] Craig v. Leitensdorfer, 123 U. S. 189.

[44] Hayward v. Andrews, 106 U. S. 672; New York Guaranty Co. v. Memphis Water Co., 107 U. S. 205.

[45] Steel v. Smelting Co., 106 U. S. 447.

[46] Steel v. Smelting Co., 106 U. S. 447, 454.

[47] Case v. Beauregard, 99 U. S. 119; Smith v. Railroad Co., 99 U. S. 398; Walser v. Seligman, 13 Fed. R. 415; Swan L. & C. Co. v. Frank, 148 U. S. 603; Hollins v. Brierfield C. & I. Co., 150 U. S. 371.

[48] Walser v. Seligman, 13 Fed. R. 415. But see Case v. Beauregard, 101 U. S. 688, 690.

[49] Case v. Beauregard, 101 U. S. 688, 690; Merchants' Nat. Bank v. Chattanooga Constr. Co., 53 Fed. R. 814.

[50] Broderick's Will, 21 Wall. 503; Ellis v. Davis, 109 U. S. 485; Simmons v. Saul, 138 U. S. 439.

[51] Oakley v. Taylor, 64 Fed. R. 245.

undue influence, forgery or other fraud; but a Federal court may enforce a bill for the construction of a will duly established.[52] Nor to enjoin an action at law to which the complainant has a clear legal defense.[53] Nor to set aside or enjoin proceedings to enforce a judgment at law because of fraud; unless the complainant had a defense to the action upon the merits,[54] and either the fraud was extrinsic to the matter tried and not in issue in the former suit, nor then known to the complainant, or else some unconscientious advantage was taken of the successful judgment debtor during the progress of the suit without any fault or negligence upon his part.[55] Nor to set aside a judgment at law[56] or a decree in equity[57] for an omission to serve a party to the same, except perhaps when the record shows an apparent service. It has been said that a receiver, assignee in bankruptcy, or assignee under a voluntary general assignment, each of whom represents creditors as well as the debtor, cannot maintain a bill to enforce a collateral obligation given to a creditor or to a body of creditors by a third person for the payment of the debts of the insolvent.[58] A bill was dismissed which sought to enforce specific performance of a contract containing a power of revocation by the defendant.[59] So was a bill to compel the transfer of corporate stock, which the complainant obtained for an inadequate consideration, and which he wished to use for purely speculative purposes and to gain thereby an unconscientious advantage.[60] In the absence of statutory authority, a private

[52] Wood v. Paine, 66 Fed. R. 807.

[53] Grand Chute v. Winegar, 15 Wall. 373; Francis v. Flinn, 118 U. S. 385; Hapgood v. Hewitt, 119 U. S. 226. See Drexel v. Berney, 122 U. S. 241.

[54] White v. Crow, 110 U. S. 183. *Contra*, Mills v. Scott, 43 Fed. R. 452.

[55] Life Ins. Co. v. Bangs, 103 U. S. 780, 782; Cragin v. Lovell, 109 U. S. 194. See Knox County v. Harshman, 133 U. S. 152; Leavenworth County Com'rs v. Chicago, R. I. & P. Ry. Co., 134 U. S. 688.

[56] Lewis v. Cocks, 23 Wall. 466.

[57] Yeatman v. Bradford, 44 Fed. R. 536.

[58] Jacobson v. Allen, 12 Fed. R. 454. A judgment creditor of a national bank cannot sue in equity to compel the receiver of the bank to recognize his judgment and to enjoin the receiver from refusing such recognition; because he has an adequate remedy by an action at law in the Federal court against the receiver upon the judgment of the State court against the bank. Denton v. Baker, 79 Fed. R. 189.

[59] Express Co. v. Railroad Co., 99 U. S. 191.

[60] M. & M. R. Co. v. Cromwell, 91 U. S. 643. See Foll's Appeal, 91 Pa. St. 434; Randolph's Ex'r v. Quidnick Co., 135 U. S. 457, 459.

individual cannot file a bill to obtain the forfeiture of a corporate franchise,[61] nor a stockholder a bill to dissolve a foreign corporation under a statute of the country which chartered it.[62] Nor can a corporation be enjoined from acting beyond its legal powers at the suit of a business rival not one of its stockholders.[63] Nor can a stockholder file a bill, founded upon rights which may properly be asserted by his corporation, against it and other parties, unless there exists, "as the foundation of the suit, some action or threatened action of the managing board of directors or trustees of the corporation which is beyond the authority conferred on them by their charter or other source of organization; or such a fraudulent transaction completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other shareholders, as will result in serious injury to the corporation, or to the interests of the other shareholders; or where the board of directors, or a majority of them, are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders; or where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity. Possibly other cases may arise in which, to prevent irremediable injury or a total failure of justice, the court would be justified in exercising its powers; but the foregoing may be regarded as an outline of the principles which govern this class of cases. But in addition to the existence of grievances which call for this kind of relief, it is equally important that before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated, effort with the managing body of the corporation to induce remedial ac-

[61] Gaylord v. Fort Wayne, M. & C. R. Co., 6 Biss. 286.

[62] Republican Silver Mines v. Brown, 58 Fed. R. 644.

[63] Railroad Co. v. Ellerman, 105 U. S. 166.

tion on their part, and this must be made apparent to the court. If time permits, or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done or it was not reasonable to require it."[64] It seems that this rule does not apply where the suit arises under the Constitution of the United States;[65] nor to a suit by a mortgagee.[66] Analogous rules regulate a suit by a stockholder to set aside a contract by the corporation as beyond the powers conferred in its charter.[67] It has been said that a court of equity has no power to seize a man's property, and through its officers complete a bridge in pursuance of a contract which he has made.[68] Nor is it a sufficient ground for the interference of a court of equity that the evidence in a cause is voluminous and tedious.[69] Nor, it has been said, upon the mere allegation of insolvency of the defendant.[70] "To give a court of equity jurisdiction, the nature of the relief asked must be equitable, even when the suit is based on an equitable title."[71] The inadequacy of the remedy at law which will justify relief in equity does not consist merely in its failure to produce the relief sought,— that is a not unusual result of all remedies,— but that in its nature or character it is not fitted or adapted to the end in view.[72]

§ 13. Federal courts which have jurisdiction in equity.— The equitable jurisdiction of the Federal courts, from which category the courts of the Territories and of the District of

[64] Hawes v. Oakland, 104 U. S. 450, 460, 461, per Miller, J. See also Huntington v. Palmer, 104 U. S. 482; Greenwood v. Freight Co., 105 U. S. 13; Detroit v. Dean, 106 U. S. 537; Quincy v. Steel, 120 U. S. 241; County of Tazewell v. Farmers' T. & Tr. Co., 12 Fed. R. 752; Symmes v. Union Trust Co. of N. Y., 60 Fed. R. 880. 858. See also Equity Rule 94, and *infra*, §§ 76, 87, 207.

[65] Ball v. Rutland R. Co., 93 Fed. R. 513. See Smyth v. Ames, 169 U. S. 466.

[66] Consolidated Water Co. v. City of San Diego, 89 Fed. R. 272.

[67] Dimpfell v. Ohio & Miss. R. Co., 110 U. S. 209; Tazewell & Farmers' Loan & T. Co., 12 Fed. R. 752; Greenwood v. Freight Co., 105 U. S. 13.

[68] Texas & St. Louis Ry. Co. v. Rust, 17 Fed. R. 275.

[69] Bowen v. Chase, 94 U. S. 812, 824.

[70] Strang v. Richmond, P. & C. R. Co., 93 Fed. R. 71, 74.

[71] Fussell v. Gregg, 113 U. S. 550, 554, per Woods, J.

[72] Miller, J., in Thompson v. Allen County, 115 U. S. 550, 554. *Cf.* Texas & P. Ry. Co. v. Marshall, 136 U. S. 393, 405.

Columbia are here excluded,[1] is in the Supreme Court, the Circuit Courts of Appeal, the Circuit Courts, the District Courts, the Court of Claims,[2] the Court of Private Land Claims.[3] The following courts also have, under statutes of the United States, jurisdiction at equity and common law, which is in some respects analogous to those of the Federal courts: the District Court of Alaska,[4] the Supreme Court of Arizona,[5] the Supreme and District Courts of Oklahoma,[6] the United States court and the Court of Appeals of the Indian Territory,[7] the District Court of Porto Rico,[8] the District Court of Hawaii,[9] the Supreme Court of the District of Columbia,[10] and the Court of Appeals of the District of Columbia.[11]

§ 13. [1] See Clinton v. Englebrecht, 13 Wall. 434; McAllister v. U. S., 141 U. S. 174. But see Cross v. U. S., 145 U. S. 571, 576.

[2] The jurisdiction and practice of the Court of Claims is described *infra*, ch. XXXI.

[3] The jurisdiction and practice of the Court of Private Land Claims is described *infra*, ch. XXXII.

[4] 23 St. at L. 24; 30 St. at L. 545; L. 1900, p. 322; *infra*, § 26*a*.

[5] U. S. R. S., § 1908.

[6] 26 St. at L. 81.

[7] 25 St. at L. 783; 28 St. at L. 693; 30 St. at L. 83; St. 1900, p. 657.

[8] St. 1900, p. 84; *infra*, § 26*a*.

[9] St. 1900, p. 158; *infra*, § 26*a*.

[10] The Supreme Court of the District of Columbia has the same jurisdiction as the Circuit Courts of the United States. D. C. Code, § 61. It has the same jurisdiction in bankruptcy, when the bankrupt resides in the district, that is vested in the District Courts of the United States. R. S. D. C., § 765. It has jurisdiction of applications for divorce. D. C. Code, § 963. It has generally the same jurisdiction that was vested in the General Court or the Supreme Court of Chancery of Maryland, February 27, 1801. D. C. Code, § 61: 19 St. at L. 253. But it has no jurisdiction of suits against persons not inhabitants of the district, except in the same way that non-residents were proceeded against in the General Court or the Supreme Court of Chancery of Maryland (May 8, 1802); and where such jurisdiction is conferred by special statutes. D. C. Code, §§ 105–112. For its jurisdiction to grant writs of mandamus, see *infra*, § 363*a*; prohibition, § 362; *quo warranto*, § 368*a*.

[11] D. C. Code, § 226. "Any party aggrieved by any final order, judgment or decree of the Supreme Court of the District of Columbia, or of any justice thereof, including any final order or judgment in any case heard on appeal from a justice of the peace, may appeal therefrom to the Court of Appeals, hereby created; and upon such appeal the Court of Appeals shall review such order, judgment or decree, and affirm, reverse or modify the same, as shall be just. Appeals shall also be allowed to said Court of Appeals from all interlocutory orders of the Supreme Court of the District of Columbia, or by any justice thereof, whereby the possession of property is changed or affected, such as orders for the appointment of receivers, granting injunctions, dissolving writs of attachment, and the like, and also from any other interlocutory order, in the discretion of said Court of Appeals, whenever it is

§ 14. Original jurisdiction of the Supreme Court.—The Supreme Court has original jurisdiction both at law and equity in all cases affecting ambassadors, other public ministers and consuls, and those in which a State is a party,[1] except where a citizen of the same State is a party, when it has no jurisdiction.[2] The jurisdiction of the Supreme Court over controversies to which a State is a party is exclusive, except as regards controversies between a State and its citizens, or between a State and citizens of other States.[3] In suits to which a State is a party the practice in equity is followed.[4] The Supreme Court has exclusively all such jurisdiction of suits against ambassadors or other public ministers, or their domestics or domestic servants, as a court of law can have consistently with the law of nations; and original, but not exclusive, jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul is a party.[5]

A State may file a bill against another State to settle and establish a disputed boundary.[6] In such a suit the United States has an interest in the controversy, and the attorney-general on his application may intervene, appear on behalf of the United States, adduce proofs and be heard in argument without making the United States a party in the technical sense of the term; but he has no right to interfere in the pleading or evidence or admissions of either of the States; and in such a suit the

made to appear to said court upon petition that it will be in the interest of justice to allow such appeal."

"The determination of appeals from the decision of the Commissioner of Patents, now vested in the general term of the Supreme Court of the District of Columbia, in pursuance of the provisions of section 780 of the Revised Statutes of the United States, relating to the District of Columbia, shall hereafter be and the same is hereby vested in the Court of Appeals created by this act; and, in addition, any party aggrieved by a decision of the Commissioner of Patents in any inference case may appeal therefrom to said Court of Appeals." Ibid., § 228; 27 St. at L. 436, § 9.

§ 14. [1] Const., art. III.

[2] California v. Southern Pac. Co., 157 U. S. 229.

[3] U. S. R. S., § 687.

[4] Georgia v. Brailsford, 2 Dall. 402; Kentucky v. Dennison, 24 How. 266.

[5] U. S. R. S., § 687.

[6] New Jersey v. New York, 3 Pet. 461; s. c., 5 Pet. 284; s. c., 6 Pet. 323; Massachusetts v. Rhode Island, 12 Pet. 755; Rhode Island v. Massachusetts, 13 Pet. 23; Florida v. Georgia, 17 How. 478; Rhode Island v. Massachusetts, 15 Pet. 233; s. c., 4 How. 591; Missouri v. Iowa, 7 How. 660; Florida v. Georgia, 17 How. 478; Virginia v. West Virginia, 11 Wall. 39; Missouri v. Iowa, 10 How. 1; Alabama v. Georgia, 23 How. 505; Missouri v. Kentucky, 11 Wall. 395.

judgment cannot be either for or against the United States.[7] Written authority from the governor of a State is sufficient to authorize a suit on behalf of the State.[8] All process of the court is in the name of the President of the United States.[9] In a suit by a State against another State the service of a subpœna sixty days before the return day is sufficient.[10] Service should be made on both the governor and the attorney-general.[11] In one case a subpœna served upon the governor by leaving a copy at his house and there showing the original to the secretary of state was held sufficient.[12]

The filing of a pleading by the attorney-general of a State who has been admitted to practice in the Supreme Court of the United States is an appearance on behalf of such State.[13] The rules concerning the time for pleading in suits between individuals do not apply to suits between the different States.[14] The State of Massachusetts was allowed to answer an amended bill of the State of Rhode Island one year after the filing of such amended bill.[15] If the State fail to appear, or if the State withdraw its appearance, no coercive measures will be taken to compel its appearance, but the complainant may be allowed to proceed *ex parte*.[16] A State cannot maintain a bill in equity to protect a purely political right.[17] Nor, it seems, except to abate a nuisance,[18] to redress the wrongs of a part of her citizens.[19] A State cannot obtain an order or judgment compelling the governor of another State to return a fugitive from labor or justice.[20] In a suit to settle a disputed boundary, the most appropriate mode of proceeding is by bill and cross-bill.[21] In suits against a State the practice is very liberal, and the utmost lib-

[7] Florida v. Georgia, 17 How. 478.

[8] Texas v. White, 7 Wall. 700, 719.

[9] Supreme Court Rule 5; New Jersey v. New York, 6 Pet. 323.

[10] Supreme Court Rule 5; Chisholm v. Georgia, 2 Dall. 419; Grayson v. Virginia, 3 Dall. 320; New Jersey v. New York, 8 Pet. 461; s. c., 5 Pet. 284; Kentucky v. Dennison, 24 How. 66.

[11] Supreme Court Rule 5.

[12] Huger v. South Carolina, 3 Dall. 339.

[13] New Jersey v. New York, 6 Pet. 623.

[14] Rhode Island v. Massachusetts, 13 Pet. 23.

[15] Rhode Island v. Massachusetts, 13 Pet. 23.

[16] Massachusetts v. Rhode Island, 12 Pet. 755; Oswald v. New York, 2 Dall. 415; Chisholm v. Georgia, 2 Dall. 419.

[17] Georgia v. Stanton, 6 Wall. 50.

[18] Missouri v. Illinois, 180 U. S. 208.

[19] Louisiana v. Texas, 176 U. S. 1.

[20] Kentucky v. Dennison, 24 How. 66.

[21] Missouri v. Iowa, 7 How. 660.

erality is exercised by the court in the correction of slips of practice or errors.[22]

A State cannot sue one of its own citizens in the Supreme Court of the United States.[23] The allegation that a defendant corporation is "a body politic in the law of and doing business in the State of California" is insufficient to establish that the defendant is a California corporation, and is insufficient to show that the defendant is not a Pennsylvania corporation.[24] A State cannot sue another State to collect bonds and coupons of the defendant which have been assigned to the plaintiff by its own citizens in order that it may collect them and pay the proceeds to the assignors.[25] A suit by a State to collect a judgment for penalties obtained in one of its own courts against a foreign corporation cannot be maintained in the Supreme Court of the United States.[26] A State may sue for an injunction against the collection by citizens of other States of certain bonds of the United States which are the property of such State, and for the delivery to it of such bonds, and for a declaration that the contract under which the defendants claim a title to such bonds is void.[27] A State may maintain a bill against citizens of other States to enforce its title to a railroad.[28] The fact that a State is a stockholder in a corporation by or against which a suit is brought does not make the State a party to such suit.[29]

The court considers the former practice of the courts of Chancery and of King's Bench, in England, as affording outlines for its practice.[30] It has made a few rules regulating the same.[31] It is the regular practice to obtain leave of the court upon a motion, which is usually heard *ex parte*, but of which, under special circumstances, the court will require notice to be served upon the proposed defendant, before an original bill in equity is filed in the Supreme Court.[32]

[22] Iowa v. Illinois, 151 U. S. 238; Rhode Island v. Massachusetts, 13 Pet. 23.

[23] Pennsylvania v. Quicksilver Co., 10 Wall. 553.

[24] Pennsylvania v. Quicksilver Co., 10 Wall. 553.

[25] New Hampshire v. Louisiana, 108 U. S. 76

[26] Wisconsin v. Pelican Ins. Co., 127 U. S. 265.

[27] Texas v. White, 7 Wall. 700, 741–743.

[28] Florida v. Anderson, 91 U. S. 667.

[29] Bank of U. S. v. Planters' Bank of Ga., 9 Wheat. 904.

[30] Supreme Court Rule 8.

[31] See Appendix.

[32] Georgia v. Grant, 6 Wall. 241.

The appellate jurisdiction of the Supreme Court is explained in the final chapter of this work. Incidental to such appellate jurisdiction, the Supreme Court has power in certain limited cases to issue writs of prohibition,[33] mandamus,[34] *habeas corpus*,[35] *scire facias*, and other writs.[36]

§ 14a. Jurisdiction of the Circuit Courts of Appeal.—There are nine Circuit Courts of Appeal, one in each circuit.[1] Their jurisdiction is exclusively appellate, and will be explained in the concluding chapter of this work. Incidental to such appellate jurisdiction, they have the power to issue writs of *scire facias* and all writs not specifically provided for by statute, which are necessary for the exercise of their respective jurisdiction and agreeable to the usages and principles of law.[2]

§ 15. Jurisdiction of the Circuit Courts of the United States.—The Circuit Courts of the United States have original cognizance, concurrently with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made under their authority, or in which controversy the United States are plaintiffs or petitioners; suits in which there is a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid; or a controversy between citizens of the same State, claiming land under grants of different States, or a controversy between citizens of a State and foreign States, citizens or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid;[1] and, irrespective of the value of the matter in dispute, of cases commenced by the United States or by direction of any officer thereof against national banks, or cases for winding up the affairs of any such bank;[2] and of all suits authorized by law

[33] U. S. R. S., § 688. See *infra*, §§ 361, 362.

[34] U. S. R. S., § 688. See *infra*, §§ 361, 363, 364.

[35] U. S. R. S., § 751. See *infra*, §§ 366, 367, 368.

[36] U. S. R. S., § 688. See *infra*, §§ 361, 365.

§ 14a. [1] 26 St. at L. 829, § 12.

[2] U. S. R. S., § 716; 26 St. at L. 829, § 12. See *infra*, §§ 361–368.

§ 15. [1] 24 St. at L., ch. 373, p. 552.

[2] 24 St. at L., ch. 373, § 4, p. 552; 30 St. at L., p. 553. See Armstrong v. Ettlesohn, 36 Fed. R. 209: Armstrong v. Trautmann, 36 Fed. R. 275; McConville v. Gilmour, 36 Fed. R. 277.

to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States, whether such suit was originally brought in one of them or removed there according to law from a State court;[3] of suits against the United States, to collect claims of more than $1,000 and not exceeding $10,000, for money only, founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any contract, expressed or implied, with the government of the United States, except to recover fees, salary or compensation for official services,[4] or to recover damages, liquidated or unliquidated, in cases not sounding in tort in respect of which claims the plaintiff would be entitled to redress against the United States, in a court of law, equity, or admiralty, if the United States were suable,—except war claims,[5] and except other claims, which, before March 3, 1887, were rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same;[6] of suits in equity brought by a tenant in common or a joint tenant for the partition of land in cases where the United States is one of such tenants in common or joint tenants;[7] of proceedings to condemn for national public uses land within their respective districts;[8] of suits to recover penalties under the act forbidding the importation of persons under a contract to perform labor;[9] of suits to enforce and prevent violations of the acts to protect trade and commerce against unlawful restraints,[10] the act to prevent the un-

[3] U. S. R. S., § 629; 24 St. at L., ch. 376, § 5. See Carter v. Greenhow, 114 U. S. 317.

[4] 30 St. at L. 495; Strong v. U. S., 93 Fed. R. 257; U. S. v. Kelly (C. C. A.), 97 Fed. R. 460; 24 St. at L. 505; U. S. v. Jones, 131 U. S. 1. See *infra*, § 36.

[5] Bodemüller v. U. S., 89 Fed. R. 437.

[6] 24 St. at L. 505; 30 St. at L. 495; U. S. v. Jones, 131 U. S. 1. See *infra*, § 36.

[7] 30 St. at L. 416.

[8] 25 St. at L., ch. 728, p. 357. See *infra*, § 381.

[9] 23 St. at L. 332; U. S. v. Mexican Nat. Ry. Co., 40 Fed. R. 269. See U. S. v. Rector of the Church of the Holy Trinity, 36 Fed. R. 303; U. S. v. Craig, 28 Fed. R. 795; 26 St. at L. 1084.

[10] 26 St. at L. 209; U. S. v. Jellico Mountain Coke & Coal Co., 43 Fed. R. 898; s. c., 46 Fed. R. 432. See American Biscuit & Mfg. Co. v. Klitz, 44 Fed. R. 721, 725, 726.

lawful occupation of public lands,[11] and the act to execute provisions of the treaties with China;[12] proceedings to review the decisions of the general appraisers[13] and under certain special statutes. Formerly Circuit Courts of the United States had jurisdiction, without regard to the value of the matter in dispute, of all suits at law or in equity arising under the patent, trade-mark, or copyright laws of the United States, or under any act providing for internal revenue, or revenue from imports or tonnage, or under the postal laws, or under any of the laws relating to the slave and cooley trade; of suits by the assignees of debentures for drawback of duties; and of proceedings by the writ of *quo warranto* prosecuted by a district attorney of the United States for the removal from office of any person holding office contrary to the Fourteenth Amendment to the Constitution, except a member of Congress or of a State legislature.[14] It has been held that those courts still have jurisdiction, irrespective of the value of the matter in dispute, of suits at law or in equity arising under the patent and copyright laws,[15] but not of those arising under the trade-mark laws,[16] of suits at law or in equity arising under the revenue laws;[17] of actions at common law by the United States[18] or an officer thereof, including in this term a receiver of a national bank appointed by the comptroller;[19] but not, it has been held, of

[11] 23 St. at L. 321.

[12] 24 St. at L. 409.

[13] 26 St. at L. 138; In re Blumlein, 45 Fed. R. 236; In re Dieckerhoff, 45 Fed. R. 235; In re Dowling, 45 Fed. R. 412.

[14] U. S. R. S., §§ 629, 2159, 3213; 18 St. at L. 478.

[15] In re Hohorst, 150 U. S. 653; In re Keasbey & Mattison Co., 160 U. S. 221, 230; Miller-Magee Co. v. Carpenter, 34 Fed. R. 433. See U. S. v. Mooney, 116 U. S. 104, 107. A suit to enjoin a tax on a patent does not arise under the patent laws. Holt v. Indiana Mfg. Co., 176 U. S. 68.

[16] In re Keasbey & Mattison Co., 160 U. S. 221, 230.

[17] Ames v. Hager, 36 Fed. R. 129.

[18] U. S. v. Sayward, 160 U. S. 493. Where a suit was brought in the name of the United States for the benefit of a third person, it was held that it should be dismissed because the matter in dispute was less than $2,000. U. S. v. Henderlong, 102 Fed. R. 2.

[19] Armstrong v. Ettlesohn, 36 Fed. R. 209; Armstrong v. Trautmann, 36 Fed. R. 275; McConville v. Gilmour, 36 Fed. R. 277; Stephens v. Bernays, 44 Fed. R. 642; Fisher v. Yoder, 58 Fed. R. 565; Brown v. Smith, 88 Fed. R. 565; Yardley v. Dickson, 47 Fed. R. 835. See Auten v. U. S. Nat. Bank, 174 U. S. 125. *Contra*, as to receivers of national banks where the matter in dispute is less than $2,000, held in Brown v. Ellis, 95 Fed. R. 1; Sullivan v. Swain, 96 Fed. R. 259. As to the agent of a shareholder of a national bank elected while its affairs

suits against such receivers where the matter in dispute, exclusive of interest and costs, is less than $2,000.[20] The Circuit Courts also have jurisdiction of suits brought by or against receivers appointed by a Federal court,[21] but whether their jurisdiction in such cases is limited to suits in which the matter in dispute, exclusive of costs, exceeds $2,000, is a disputed question.[22] They have also exclusive jurisdiction of prosecutions for all capital crimes against the United States and for depositing fraudulent papers in the archives of the office of the Surveyor General in California; and concurrent jurisdiction with the District Courts of all other crimes against the United States, except as limited by special statutes.[23]

The Circuit Courts have jurisdiction, irrespective of the amount involved, to try and determine any action, suit, or special proceeding arising within their respective jurisdictions, involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty. The judgment or decree of any such court in favor of any claimant to any allotment of land has the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him. This jurisdiction does not extend to any lands held on August 15, 1894, by either of the five civilized tribes, nor to any lands within the Quapaw Indian agency.[24]

The Judiciary Act of 1887 provides: "That all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them,

are being wound up, see Snohomish County v. Puget Sound Nat. Bank, 81 Fed. R. 518. There is a *dictum* that a corporation, such as a telegraph company which is an agent of the United States, can, in all matters affecting its existence as an agent, sue in a Circuit Court irrespective of the amount in controversy. W. U. Tel. Co. v. City Council, 56 Fed. R. 419.

[20] Smithson v. Hubbell, 81 Fed. R. 593; Follett v. Tillinghast, 82 Fed. R. 841; Sullivan v. Swain, 96 Fed. R. 259. *Cf.* Gilbert v. McNulta, 96 Fed. R. 88.

[21] White v. Ewing, 159 U. S. 36.

[22] The following cases hold that they are: Carpenter v. Northern Pac. R. Co., 75 Fed. R. 850; Sullivan v. Bannon, 81 Fed. R. 886. See also Texas & Pac. Ry. Co. v. Cox, 145 U. S. 593; White v. Ewing, 159 U. S. 36, 39; Gilmore v. Herrick, 93 Fed. R. 525; Ray v. Pierce, 81 Fed. R. 881; Pitkin v. Cowen, 91 Fed. R. 599. See *infra*, §§ 17, 21, 249, 251.

[23] U. S. R. S., §§ 629, 5412; 18 St. at L. 470.

[24] 28 St. at L. 305.

real, personal or mixed, and all suits in equity should be deemed citizens of the States in which they are respectively located; and in such cases the Circuit and District Courts shall not have jurisdiction over them such as they would have in cases between individual citizens of the same State. The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank."[25] It further provides: "Nor shall any Circuit or District Court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note, or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made; and the Circuit Courts shall also have appellate jurisdiction from the District Courts under the regulations and restrictions prescribed by law."[26]

The Bankruptcy Act provides that "the United States Circuit Courts shall have jurisdiction of all controversies of law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted, and such controversies had been between the bankrupts and such adverse claimants. Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant. The United States Circuit Courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this act."[27] The Circuit Courts also have certain ancillary jurisdiction which is hereinafter explained.[28]

[25] 25 St. at L. 433. See *infra*, § 17.
[26] Ibid. See *infra*, § 24.
[27] 30 St. at L. 552, 553. See *infra*, § 25.
[28] *Infra*, § 31.

§ 16. Value of the matter in dispute.— The value of the matter in dispute must ordinarily exceed, exclusive of interest and costs, the sum of two thousand dollars.[1] This signifies not the amount of any contingent loss or damage which one of the parties may sustain by a decision against him, but the amount in dispute between the parties in the pending suit.[2] Thus, the reason that, on account of its probative force, the judgment may operate as an estoppel in a subsequent proceeding,[3] or affect his rights against a stranger to the suit,[4] does not increase the value of the matter in dispute. Where the suit is upon a demand on which the law liquidates the damages for a default, the amount of the damages as liquidated by the law, not the amount named in the plaintiff's pleading, is the value of the matter in dispute;[5] but where the alleged cause of action is one in which the law does not liquidate the damages, the amount for which the plaintiff demands judgment is alone to be considered,[6] unless it clearly appears that the amount named is merely colorable, and beyond the amount of a reasonable expectation of recovery.[7] Should the latter fact appear for the first time upon the trial, it seems that the court would then be justified in dismissing the case at the close of plaintiff's evidence.[8] In an action of debt on a bond of $100, the principal and interest are put in demand, and no more can be

§ 16. [1] Act of March 3, 1887, § 1; 24 St. at L., ch. 373. p. 552.

[2] Ross v. Prentiss, 3 How. 771, 772; Elgin v. Marshall, 106 U. S. 579; Bruce v. M. & K. R. Co., 117 U. S. 514.

[3] Elgin v. Marshall, 106 U. S. 579; Bruce v. M. & K. R. Co., 117 U. S. 514; Mayor, etc. of Baltimore v. Postal Tel. C. Co., 62 Fed. R. 500.

[4] Smith v. Adams, 130 U. S. 167.

[5] Wilson v. Daniel, 3 Dall. 401, 407; Barry v. Edmunds, 116 U. S. 550, 560; Cabot v. McMaster, 61 Fed. R. 129; North Am. T. & T. Co. v. Morrison, 178 U. S. 262; Vance v. W. A. Vandercook Co., 170 U. S. 468.

[6] Smith v. Greenhow, 109 U. S. 669; Wilson v. Daniel, 3 Dall. 401, 407; Barry v. Edmunds, 116 U. S. 550, 560; Gorman v. Havird, 141 U. S. 206. In an action for damages resulting from the death of plaintiff's husband and father, the sum named and prayed for was —— thousand dollars. It was held that the case could not be removed. Yarde v. Baltimore & O. R. Co., 57 Fed. R. 913.

[7] Lee v. Watson, 1 Wall. 337; Bowman v. Chicago & N. W. Ry. Co., 115 U. S. 611, 616; Smith v. Greenhow, 109 U. S. 669; Mayor, etc. of Baltimore v. Postal Tel. C. Co., 62 Fed. R. 500; Bank of Arapahoe v. David Bradley & Co., 72 Fed. R. 867; Shields v. McCandlish, 78 Fed. R. 818.

[8] Maxwell v. A., T. & S. F. Ry. Co., 84 Fed. R. 286, 290; Holden v. Utah S. & M. M. Co., 82 Fed. R. 209; Cabot v. McMaster, 61 Fed. R. 129. For what is sufficient evidence of good faith, see Peeler v. Lathrop, 48 Fed. R. 780; *infra*, § 293.

recovered except costs, though the plaintiff lay his damages at $10,000. The value of the matter in dispute cannot, therefore, exceed $100 with interest and costs.[9] Where, however, a receiver claimed property attached upon a claim for less than the jurisdictional amount, it was held that the property attached, not the claim against the debtor, was the matter in dispute between the plaintiff and the receiver.[10] In an action for false imprisonment[11] or assault and battery, or in which exemplary damages may properly be claimed, the law prescribes no limitation to the amount that can be recovered; and the amount claimed by the plaintiff is the sole criterion to which resort can be had in settling the question of jurisdiction.[12] In ejectment the value of the matter in dispute is that of the interest in the land to recover which the suit is brought, although the defendant only claims an easement in the same.[13] In a suit affecting the right to hold an office, the amount of the salary for the term claimed is the value of the matter in dispute.[14] The value of the property sued for is not always the matter in dispute.[15] Where a complaint contains several counts, each for a a separate sum alleged to be due, and disputed by the defendant, the aggregate of the sums constitutes the value of the matter in dispute.[16] The value of the matter in dispute, in a suit for an accounting, has been said to be the amount of the disputed items

[9] Wilson v. Daniel, 3 Dall. 401, 407.

[10] Hoover & Allen Co. v. Columbia S. P. Co., 68 Fed. R. 945.

[11] Hynes v. Briggs, 41 Fed. R. 468.

[12] Wilson v. Daniel, 3 Dall. 401, 407; Barry v. Edmunds, 116 U. S. 550, 560. But see Maxwell v. A., T. & S. F. R. Co., 34 Fed. R. 286. See as to trespass, Brown v. Webster, 156 U. S. 328.

[13] McCormick v. Gray, 13 How. 26; Greene v. Tacoma, 53 Fed. R. 562. See Vicksburg, S. & P. R. Co. v. Smith, 135 U. S. 195.

[14] Smith v. Whitney, 116 U. S. 167, 173; Smith v. Adams, 130 U. S. 167, 175; Armstrong v. Ettlesohn, 36 Fed. R. 209; Bernheim v. Birnbaum, 30 Fed. R. 885, 887.

[15] Gibson v. Shufeldt, 122 U. S. 27, 29, per Gray, J.

[16] Armstrong v. Ettlesohn, 36 Fed. R. 209; Bernheim v. Birnbaum, 30 Fed. R. 885, 887; Weaver v. Norway Tack Co., 80 Fed. R. 700. An assignee of several claims, each of which is less than the jurisdictional amount, may sue in a Circuit Court when the sum exceeds it, provided his bill is not multifarious, and that his assignors as well as himself have the requisite difference of citizenship. Bernheim v. Birnbaum, 30 Fed. R. 885, 887; Bowden v. Burnham (C. C. A.), 59 Fed. R. 752; Davis v. Mills, 99 Fed. R. 39; Chase v. Sheldon R. M. Co., 56 Fed. R. 625: Bergman v. Inman P. & Co., 91 Fed. R. 293; Hammond v. Cleveland, 23 Fed. R. 1; *infra*, § 24. As to multifariousness, see Fitchett v. Blows (C. C. A.), 74 Fed. R. 47; *infra*, §§ 71–75.

of the account.[17] In a suit for an injunction the amount in dispute is the value of the object to be gained by the bill, not merely the amount of damages already suffered by the complainant.[18] Thus in a suit to enjoin the use of a trade-mark and compel an account of profits, the value of the matter in dispute is the value of the trade-mark, not the amount of profits which the defendant has derived from its use.[19] In a suit to enjoin the use of a railway by a party not its owner, the value of the use of the railway, not the value of the railway, was held to be the value of the matter in dispute.[20] Upon a bill to abate a nuisance, the value of the property sought to be destroyed, not the amount of plaintiff's damages, is the value of the matter in dispute.[21] Upon a bill to enjoin the illegal seizure of imported liquors, it was held sufficient to allege that defendants had already seized several packages of the same imported for the plaintiff's own use and consumption; that his right to make such importation for his own use was of the money value of upwards of $2,000; and that the value of said articles which he intended to import for his own use and consumption, and which defendants threatened to seize, exceeded the sum of $2,000.[22] Upon a bill to enjoin a trespass, which it was alleged would entirely destroy the use of certain land, it was held that the value of the land was the jurisdictional test.[23] In a suit by a railway company to enjoin a shipper from a multiplicity of suits to recover overcharges, the value of the matter in dispute was held to be the value to the railroad of the maintenance of its schedule rates.[24] The allegation by a mortgagee that the act which he sought to enjoin would impair the value of his security to the extent of more than $2,000 was held to be sufficient to support the jurisdiction.[25] It has been held that the jurisdictional test in a suit to enjoin the collection of

[17] McCormick v. Gray, 13 How. 26.

[18] Mississippi & Mo. R. Co. v. Ward, 2 Black, 485; Market Co. v. Hoffman, 101 U. S. 112; Symonds v. Greene, 28 Fed. R. 834; Whitman v. Hubbell, 30 Fed. R. 81.

[19] Symonds v. Greene, 28 Fed. R. 834.

[20] Oleson v. Northern Pac. R. Co., 44 Fed. R. 1.

[21] Rainey v. Herbert (C. C. A.), 55 Fed. R. 443; Mississippi & Mo. R. Co. v. Ward, 2 Black, 485; Maffet v. Quine, 95 Fed. R. 199. But see Kenyon v. Knipe, 46 Fed. R. 809.

[22] Scott v. Donald, 165 U. S. 107, 115.

[23] Smith v. Bivens, 56 Fed. R. 852.

[24] Texas & P. Ry. Co. v. Kuteman (C. C. A.), 54 Fed. R. 547. *Cf.* Lanning v. Osborne, 79 Fed. R. 657.

[25] Clapp v. Spokane, 53 Fed. R. 515.

a tax is the amount of the tax, not the value of the property which the defendant threatens to seize;[26] but that where it is sought to enjoin the collection of an annual tax or license fee imposed upon a franchise or right to exercise a certain business, the value of the right to exemption, not the amount of the tax or fee claimed to be due, is to be considered.[27] Upon a taxpayer's bill to enjoin the issue of municipal bonds, it was held that the value of the matter in dispute was the amount of the consequent tax he would have to pay, not the amount of the bonds.[28] Upon a creditor's bill, the value of the complainant's claim, not the value of the property sought to be reached was held to be the jurisdictional test when he sued for himself alone.[29] In a suit to cancel a paper purporting to be a marriage contract, the amount of the provision which the woman would be entitled to receive from her husband, were the contract held binding, is the value of the matter in dispute.[30] But upon a bill for divorce claiming alimony which alleged that the defendant's income was $10,000 a year, it was held that since the alimony was incidental to the main object of the suit, and its allowance and amount were discretionary, the value of the matter in dispute did not appear.[31] The value of the right to appeal from the probate of a will was held to be at least equal to the share of the appellant in case the decedent had died intestate.[32] In a suit to quiet title, or to remove a cloud therefrom, the test is the value of the plaintiff's property affected by the adverse claim.[33] In a suit to compel the issue

[26] Linehan Ry. Tr. Co. v. Pendergass (C. C. A.), 70 Fed. R. 1; Washington & G. R. Co. v. District of Columbia, 146 U. S. 227, 232.

[27] W. U. Tel. Co. v. City Council, 56 Fed. R. 419, 420; Humes v. Fort Smith (Ark.), 93 Fed. R. 857. *Cf.* Am. Fertilizer Co. v. Board of Agriculture, 43 Fed. R. 609. But see Citizens' Bank v. Cannon, 164 U. S. 319.

[28] Calvin v. Jacksonville, 158 U. S. 456; Murphy v. East Portland, 42 Fed. R. 808. But see Brown v. Trousdale, 138 U. S. 389.

[29] Werner v. Murphy, 60 Fed. R. 769. See Stillwell, Bierce & S. V. Co. v. Williamston O. & F. Co., 80 Fed. R. 68; Alkire Gr. Co. v. Richesin, 91 Fed. R. 79. So where a creditor of a corporation sought to set aside its fraudulent conveyances. Werner v. Murphy, 60 Fed. R. 769.

[30] Sharon v. Terry, 36 Fed. R. 337.

[31] Bowman v. Bowman, 30 Fed. R. 849. But see Simms v. Simms, 175 U. S. 162.

[32] Erwin v. Walsh, 27 Fed. R. 579.

[33] Parker v. Morrill, 106 U. S. 1; Lehigh Z. S. Co. v. N. J. Zinc & Iron Co., 43 Fed. R. 545; Woodside v. Ciceroni (C. C. A.), 93 Fed. R. 1; Felch v. Travis, 92 Fed. R. 210; Fuller v. Grand Rapids, 40 Mich. 395.

to complainant of a certificate of corporate stock and the cancellation of that issued to another, the par value of the stock was held to be the value of the matter in dispute.[34] In a stockholder's suit to enforce a cause of action belonging to his corporation, the value of the matter in dispute was held to be the value of the corporate right sought to be enforced, not the value of the plaintiff's interest therein.[35] In a stockholder's suit for a receiver of the corporate assets, the value of the assets, not the value of his stock, was held to be that of the matter in dispute.[36] In a suit for the administration of a trust fund, the value of the matter in dispute was held to be the fund, not the complainant's interest therein;[37] but in a suit by a creditor to enjoin the receiver of a national bank from paying a fraudulent claim, it was held that the amount of the plaintiff's claim, not of that attacked, was held to be the test.[38] In a suit to redeem land, the value of the equity of redemption is the value of the matter in dispute.[39]

It has been held that where a number of plaintiffs, claiming under the same title and having a common and undivided interest in the relief sought, unite in a suit, action or proceeding, their united interests constitute the matter in dispute;[40] but where a suit is brought by one or more for themselves and all others of a class similarly situated, the aggregate interest of those who join in the suit, not that of the whole class, constitutes the matter in dispute.[41] Mr. Justice Brown said: "Where two or more plaintiffs, having several interests, unite

[34] Ryan v. Seaboard & R. R. Co., 89 Fed. R. 397.

[35] Hill v. Glasgow R. Co., 41 Fed. R. 610.

[36] Towle v. American Bldg., L. & I. Soc., 60 Fed. R. 131. *Cf.* Robinson v. W. Va. Loan Co., 90 Fed. R. 770.

[37] Putnam v. Timothy D. & S. C. Co., 79 Fed. R. 454.

[38] Smithson v. Hubbell, 81 Fed. R. 593. See Werner v. Murphy, 60 Fed. R. 769.

[39] Carne v. Russ, 152 U. S. 250. In a suit to foreclose a mortgage, held that the matter in dispute was the debt. Stillwell B. & S. V. Co. v. Williamston O. & F. Co., 80 Fed. R. 68.

[40] Shields v. Thomas, 17 How. 3; Market Co. v. Hoffman, 101 U. S. 112; Davies v. Corbin, 112 U. S. 36; Estes v. Gunter, 121 U. S. 183; Lovett v. Prentice, 44 Fed. R. 459; Prince v. Towns, 33 Fed. R. 161; Hartford Fire Ins. Co. v. Bonner M. Co., 56 Fed. R. 878; Herbert v. Raney, 54 Fed. R. 248; s. c. in C. C. A., 55 Fed. R. 443. *Cf.* Gibson v. Shufeldt, 122 U. S. 27; Clay v. Field, 138 U. S. 464, 479.

[41] Bruce v. Manchester & K. R. Co., 117 U. S. 514, 516; Massa v. Cutting, 30 Fed. R. 1; Adams v. Board of County Com'rs, McCahon (U. S. C. C. D. Kan.), 235; Rich v. Bray, 37 Fed. R. 273; Johnson v. Waters, 111 U. S. 640; Handley v. Stutz, 137 U. S. 366,

for the convenience of litigation in a single suit, it can only be sustained in the court of original jurisdiction, or on appeal to this court, as to those whose claims exceed the jurisdictional amount;[42] and that, where two or more defendants are sued by the same plaintiff in one suit, the test of jurisdiction is the joint or several character of the liability to the plaintiff."[43] Thus, where a corporation sued to enjoin several county officials from the levy of State, school and county taxes, it was held that the amount of the largest tax which one county sought to levy was the test of the jurisdiction,[44] although the State railroad commissioners, who had already acted, were also made defendants;[45] but in a suit to enjoin a State court, which had not acted, from certifying an assessment to the different counties, it was held that the whole amount which they threatened to certify, not the amount in any county, was the value of the matter in dispute.[46] The interest excluded from consideration includes interest accrued on the demand before the suit was brought.[47] It includes interest which is collected only as an incident of the principal demand, and not interest which is the subject of a separate contract, and which might be the subject of a separate suit.[48] So the face value of coupons due before the suit may be added to the principal named in the bond when the jurisdictional amount is determined;[49] but interest which accrued upon bonds and coupons after their

869; Miller v. Clark, 138 U. S. 223; Smithson v. Hubbell, 81 Fed. R. 593; Sioux Falls Nat. Bank v. Swenson, 48 Fed. R. 621. See Brown v. Trousdale, 138 U. S. 389; Hill v. Glasgow R. Co., 41 Fed. R. 610.

[42] Ogden City v. Armstrong, 168 U. S. 224; Whelen v. St. Louis, 180 U. S. 379; Auer v. Lombard, 72 Fed. R. 209. See Putney v. Whitmire, 66 Fed. R. 885; Holt v. Bergevine, 60 Fed. R. 1; Rich v. Bray, 37 Fed. R. 273; Busey v. Smith, 67 Fed. R. 13.

[43] Walter v. Northeastern R. Co., 147 U. S. 370, 373; Pacific Live Stock Co. v. Hanley, 98 Fed. R. 327; Stemmler v. McNeill, 102 Fed. R. 660. See Busey v. Smith, 67 Fed. R. 13; Sioux Falls Nat. Bank v. Swenson, 48 Fed. R. 621.

[44] Walter v. N. E. R. Co., 147 U. S. 370; Northern Pac. R. Co. v. Walker, 148 U. S. 391; Citizens' Bank v. Cannon, 164 U. S. 319.

[45] Fishback v. W. U. Tel. Co., 161 U. S. 96.

[46] W. U. Tel. Co. v. Poe, 61 Fed. R. 449; W. U. Tel. Co. v. Norman, 77 Fed. R. 18.

[47] Moore v. Edgefield, 82 Fed. R. 498.

[48] Edwards v. Bates County, 163 U. S. 269.

[49] Edwards v. Bates County, 163 U. S. 269. But see Home S. F. Inv. & A. Co. v. Ray, 69 Fed. R. 657.

maturity cannot.[50] Where the relief sought did not include interest, as such, together with a principal to which it was incidental, but a calculation of interest was used as an instrumentality in determining the amount of damages caused by a breach of warranty, it was held that the interest was a part of the jurisdictional amount.[51] Where the bill claimed payment of a sum as the amount of a bid for an advance by a building and loan association, it was held that the court could not arbitrarily assume that it was usurious interest cloaked with that name.[52] In a suit to foreclose a mortgage, premiums paid by the mortgagee, when claimed, are part of the jurisdictional amount.[53] It has been held that notarial fees for the presentment and protest of a note, although paid before suit brought, are costs, not damages, and cannot be counted in estimating the value of the matter in dispute;[54] but that an attorney's fee, stipulated for in a note, is not costs, and is a part of the jurisdictional amount.[55]

The fact that the plaintiff's pleading shows a sufficient defense to part of his claim to reduce it below the jurisdictional amount has been held not to divest the court of jurisdiction before answer.[56] Whether the amount of a counter-claim should be added to that of the plaintiff's claim in determining the jurisdictional amount has been the subject of conflicting adjudications.[57] Where the counter-claim belonged to a class which by the State statute was barred unless pleaded in the suit, it was

[50] Greene County v. Kortrecht (C. C. A.), 81 Fed. R. 241.

[51] Brown v. Webster, 156 U. S. 328.

[52] Building & L. Ass'n v. Price, 169 U. S. 45. See Turner v. Southern H. R. & L. Ass'n (C. C. A.), 101 Fed. R. 308.

[53] Coolidge v. Ray, 75 Fed. R. 89.

[54] Baker v. Howell, 44 Fed. R. 118. See Less v. English (C. C. A.), 85 Fed. R. 471.

[55] Rogers v. Riley, 85 Fed. R. 471.

[56] Schunk v. Moline & S. Co., 147 U. S. 500; Harding v. Cass County, 42 Fed. R. 652. But see Edwards v. Bates County, 55 Fed. R. 436; s. c., 163 U. S. 269; Chicago Cheese Co. v. Fogg, 53 Fed. R. 72.

[57] It was held that it should be, in Clarkson v. Manson, 4 Fed. R. 257; Carson & R. L. Co. v. Holtzclaw, 39 Fed. R. 578; Falls W. Mfg. Co. v. Broderick, 6 Fed. R. 654; La Montagne v. T. Harvey Lumber Co., 44 Fed. R. 645; Bennett v. Devine, 45 Fed. R. 705; Wolcott v. Sprague, 55 Fed. R. 545. See N. Y. I. & P. Co. v. Milburn G. & M. Co., 35 Fed. R. 225; McGinity v. White, 3 Dillon, 350; s. c., Fed. Cases No. 8,802. See also Dushane v. Benedict, 120 U. S. 630; Lovell v. Cragin, 136 U. S. 130, 146; Block v. Darling, 140 U. S. 234; Bennett v. Forest, 69 Fed. R. 421. *Contra*, Industrial & M. G. Co. v. El. Supply Co. (C. C. A.), 58 Fed. R. 732.

held that it was to be included.[58] The admission in the defendant's pleading of part of the plaintiff's claim will not divest the court of jurisdiction;[59] at least where there was a substantial dispute thereabout when the suit was commenced.[60]

The pleadings on the petition for removal must show that the value of the matter in dispute exceeds the jurisdictional amount.[61] The court, may, however, where the bill or declaration is defective in that respect, retain jurisdiction and permit an amendment which shows the jurisdictional value of the matter in dispute.[62] Where the averments of the bill were sufficient, but it appeared by uncontradicted affidavits that the value of the matter in dispute was less than $2,000, it was held that a preliminary injunction should be denied.[63] If at any time in the progress of the case it appears that the allegation concerning the jurisdictional amount was not made in good faith and that the dispute is for less than $2,000, the court will immediately dismiss the case.[64] It has been said that the bur-

[58] Lee v. Continental Ins. Co., 74 Fed. R. 424.

[59] Fuller v. Met. Life Ins. Co., 37 Fed. R. 163. See Stillwell B. & S. V. Co. v. Williamston O. & F. Co., 80 Fed. R. 68.

[60] Jones v. Rowley, 73 Fed. R. 286; *infra*, § 293.

[61] Yellow A. M. & M. Co. v. Winchell, 95 Fed. R. 213; Back v. Sierra N. C. M. Co., 46 Fed. R. 673; Strasburger v. Beecher, 44 Fed. R. 209; Harvey v. Raleigh & G. R. Co., 89 Fed. R. 115. An allegation that the "amount in dispute" exceeds the jurisdictional sum is not insufficient because it uses the word "amount" instead of "matter" in dispute. Blackburn v. Portland G. M. Co., 175 U. S. 571. The pleading or petition for removal must show the value at the time the suit was brought. Strasburger v. Beecher, 44 Fed. R. 209. Where the complaint was silent, the allegation in the answer was held to be conclusive. W. U. Tel. Co. v. White, 102 Fed. R. 705.

[62] Davis v. Kansas City, S. & M. R. Co., 32 Fed. R. 863; Whalen v. Gordon (C. C. A.), 95 Fed. R. 305; Johnston v. Trippe, 33 Fed. R. 530. See Citizens' Bank v. Cannon, 164 U. S. 319.

[63] U. S. Exp. Co. v. Poe, 61 Fed. R. 475. But see Hat Sweat Mfg. Co. v. Porter, 46 Fed. R. 757.

[64] Chicago Cheese Co. v. Fogg, 53 Fed. R. 72; Simon v. House, 46 Fed. R. 317; Holden v. Utah & M. Mach. Co., 82 Fed. R. 209; Horst v. Merkley, 59 Fed. R. 502; Maxwell v. A., T. & S. F. R. Co., 34 Fed. R. 286; Bedford Quarries Co. v. Welch, 100 Fed. R. 513; Bank of Arapahoe v. David Bradley Co. (C. C. A.), 73 Fed. R. 867. Where, however, the plaintiff sued in good faith for a principal sum in excess of $2,000, and the defendant proved a set-off, the exact amount of which plaintiff did not know when he commenced the suit, it was held that the court might retain jurisdiction. Pickham v. Wheeler B. Mfg. Co. (C. C. A.), 77 Fed. R. 663; s. c., 69 Fed. R. 419; Stillwell B. & S. V. Co. v. Williamston O. & F. Co., 80 Fed.

den of proof that the matter in dispute is less than the jurisdictional amount, when the plaintiff's pleading alleges that fact, rests upon the defendant; should be set up by a plea in abatement; and is waived by an answer to the merits.[65]

§ 17. Suits arising under the Constitution or laws of the United States.—A suit arises under the Constitution or a law of the United States whenever its correct decision depends on the construction of either.[1] "When a proposition has once been decided by the Supreme Court of the United States, it can no longer be said that in it there still remains a Federal question. More correctly it is said that there is no question, State or Federal."[2] The Federal question in the case must be substantial and not merely colorable.[3] When either party is a corporation chartered by Congress, the case is one arising under a law of the United States.[4] Not, however, when the sole corporate party derives its charter from a Territorial statute.[5] Suits to which national banks are parties are exempted from the operation of this rule by the Judiciary Act of 1887, except cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any

R. 68. See also Schunk v. Moline M. & S. Co., 147 U. S. 500; Kunkel v. Brown (C. C. A.), 99 Fed. R. 593; Jones v. McCormick H. M. Co. (C. C. A.), 82 Fed. R. 295; Hayward v. Nordburg Mfg. Co. (C. C. A.), 85 Fed. R. 4; Ung Lung Chung v. Holmes, 93 Fed. R. 323; Tennent-Stribling Shoe Co. v. Roper, 94 Fed. R. 739; Scott v. Donald, 165 U. S. 58; Von Schroeder v. Brittan, 93 Fed. R. 9.

[65] Butchers' & D. S. Y. Co. v. Louisville & N. R. Co. (C. C. A.), 67 Fed. R. 35. See Pine v. New York, 103 Fed. R. 337; §§ 125, 293. But see Greene v. Tacoma, 53 Fed. R. 562.

In revising section 16 the writer has been aided by a valuable note by W. L. Clarke, Esq., published in 19 C. C. A. 75.

§ 17. [1] Cohens v. Virginia, 6 Wheat. 264, 379; Tennessee v. Davis, 100 U. S. 257, 264; Starin v. New York, 115 U. S. 248, 257; Southern Pac. R. Co. v. California, 118 U. S. 109, 112; Wiley v. Sinker, 179 U. S. 58. But see Kentucky v. Louisville Bridge Co., 42 Fed. R. 241.

[2] Brewer, J., in Kansas v. Bradley, 26 Fed. R. 289, 290.

[3] Starin v. New York, 115 U. S. 248, 257; Southern Pac. R. Co. v. California, 118 U. S. 109, 112; New Orleans v. Benjamin, 153 U. S. 411; St. Joseph & G. I. R. Co. v. Steele, 167 U. S. 659; McCain v. Des Moines, 174 U. S. 168; Blue Bird Min. Co. v. Largey, 49 Fed. R. 289, 291; W. U. Tel. Co. v. Ann Arbor R. Co., 178 U. S. 239.

[4] Osborn v. U. S. Bank, 9 Wheat. 738, 823; Pacific Railroad Removal Cases, 115 U. S. 1; Northern Pac. R. Co. v. Amato, 144 U. S. 465; St. Joseph & G. I. R. Co. v. Steele, 167 U. S. 659.

[5] Adams Express Co. v. Denver & R. G. R. Co., 16 Fed. R. 712.

such bank.[6] This exception leaves the Circuit and District Courts with jurisdiction over cases therein included commenced after the act of 1887.[7] A suit seeking a receiver of the assets of a national bank which were in the hands of a statutory agent of the shareholders was held to be within the jurisdiction of a Federal Circuit Court.[8] Where all the parties on the other side of the controversy are citizens of a different State from that where the national bank is located, the Circuit Court may have jurisdiction of the case if the residence and value of the subject-matter fulfill the statutory requirements.[9] A suit by a national bank upon the bond of its cashier, conditioned upon the performance of his duties "according to law and the by-laws" of the bank, was held to arise under the statutes of the United States.[10] Suits to determine the title to a patent,[11] which are not founded upon section 4915 of the Revised Statutes,[12] to compel the assignment of a patent[13] or copyright,[14] and to enforce by a judgment for royalties[15] or

[6] Act of March 3, 1887, § 4, 24 St. at L. 552. See Armstrong v. Ettlesohn, 36 Fed. R. 209; Armstrong v. Trautmann, 36 Fed. R. 275; McConville v. Gilmour, 36 Fed. R. 277; Whittemore v. Amoskeag Nat. Bank, 134 U. S. 527; First Nat. Bank v. Forest, 40 Fed. R. 705; Ex parte Jones, 164 U. S. 691; Farmers' Nat. Bank v. McElhinney, 42 Fed. R. 801; Sowles v. First Nat. Bank of St. Albans, 46 Fed. R. 513; Bailey v. Mosher (C. C. A.), 63 Fed. R. 488; Bailey v. Mosher, 74 Fed. R. 15; Prescott v. Haughey, 65 Fed. R. 653; Speckart v. German Nat. Bank, 85 Fed. R. 12.

As to the right to review the State court's decisions in such cases, see McCormick v. Market Nat. Bank, 165 U. S. 538; Seeberger v. McCormick, 175 U. S. 274; First Nat. Bank v. Anderson, 172 U. S. 573; Capital Nat. Bank v. First Nat. Bank, 172 U. S. 425; Chemical Nat. Bank v. City Bank, 160 U. S. 646; Union Nat. Bank v. Louisville, N. A. & C. Ry. Co., 163 U. S. 325; Logan County Nat. Bank v. Townsend, 139 U. S. 67; Leyson v. Davis, 170 U. S. 36; Miller v. Lancaster Nat. Bank, 106 U. S. 542; California Nat. Bank v. Kennedy, 167 U. S. 362.

[7] Stephens v. Bernays, 44 Fed. R. 642.

[8] Snohomish County Bank v. Puget Sound Nat. Bank, 81 Fed. R. 518; Lake Nat. Bank v. Wolfeborough Nat. Bank (C. C. A.), 78 Fed. R. 517.

[9] Petri v. Commercial Nat. Bank, 142 U. S. 644; First Nat. Bank v. Forest, 40 Fed. R. 705.

[10] Walker v. Windsor Nat. Bank (C. C. A.), 56 Fed. R. 76.

[11] Montgomery P. S. C. Co. v. Street S. C. Line, 43 Fed. R. 329.

[12] Bernardin v. Northall, 77 Fed. R. 849.

[13] Pliable Shoe Co. v. Bogart, 81 Fed. R. 521.

[14] Hoyt v. Bates, 81 Fed. R. 641.

[15] Albright v. Teass, 106 U. S. 613; Dale Tile Mfg. Co. v. Hyatt, 125 U. S. 46; Felix v. Scharnweber, 125 U. S. 54. But see St. Paul v. Starling, 127 U. S. 376.

otherwise,[16] or to set aside[17] a contract for the use of a patent or copyright, such as a license, at least where the validity of the patents and copyrights are not disputed, do not arise under the laws of the United States. But a suit arises under the laws of the United States when brought to enjoin the infringement of a patent although the defendant does not deny the validity thereof.[18] It has been said that a dispute as to the assignability of a license to use a patent arises under the laws of the United States.[19] A suit to enjoin an imitation of a trade-mark does not arise under the laws of the United States, unless the bill shows that the trade-mark is duly registered, and that it is used on goods intended to be transported to a foreign country, or to be used in lawful trade with an Indian tribe.[20] A suit to restrain unfair competition in trade where the complainant seeks no protection for a registered trade-mark does not present a Federal question in the absence of special circumstances.[21] A proceeding under United States Revised Statutes, section 2326, for the trial of adverse claims to a mining patent is not cognizable by the Federal courts unless there is a dispute as to the construction or validity of an act of Congress or a difference of citizenship.[22] It has been held that questions of fact as to whether a mine is a "vein," "lode," or "ledge," and as to what is the top or apex of a vein within the meaning of United States Revised Statutes, sections 2320, 2322 and 2325, and as to what are the boundaries mentioned in a mining patent or land grant, do not involve Federal questions;[23] that a suit

[16] Marsh v. Nichols S. S. Co., 140 U. S. 344; Pratt v. Paris G. L. & Co., 168 U. S. 255.

[17] Wilson v. Sandford, 10 How. 99; Hartell v. Tilghman, 99 U. S. 547; Wader v. Lawder, 165 U. S. 624; McMullen v. Bowers (C. C. A.), 102 Fed. R. 494; Standard D. Mfg. Co. v. Nat. Tooth Co., 95 Fed. R. 291.

[18] White v. Rankin, 144 U. S. 628; Walter A. Wood H. Co. v. Minneapolis E. H. Co., 61 Fed. R. 256; Atherton Mach. Co. v. Atwood-Morrison Co. (C. C. A.), 102 Fed. R. 949; Dunham v. Bent, 72 Fed. R. 60; Young R. L. N. Co. v. Young L. N. Co., 72 Fed. R. 62; Elgin W. P. & P. Co. v. Nichols (C. C. A.), 65 Fed. R. 215. But see Silver v. Holt, 84 Fed. R. 809.

[19] Walter A. Wood Co. v. Minneapolis E. H. Co., 61 Fed. R. 256.

[20] Allen B. Wrisley Co. v. George E. Rouse S. Co. (C. C. A.), 90 Fed. R. 5; Ryder v. Holt, 128 U. S. 525; Trade-mark Cases, 100 U. S. 82.

[21] Illinois Watch Co. v. Elgin Nat. W. Co. (C. C. A.), 94 Fed. R. 667; s. c., 179 U. S. 665, 677; Burt v. Smith (C. C. A.), 71 Fed. R. 161.

[22] Blackburn v. Porland G. M. Co., 175 U. S. 571; Shoshone M. Co. v. Rutter, 177 U. S. 505.

[23] Blue Bird Min. Co. v. Largey, 49 Fed. R. 289; Largey v. Blue Bird Min.

to set aside a land patent solely on account of fraud does not arise under the Constitution and laws of the United States,[24] nor does a bill when filed by a homestead entryman to secure his protection while making the improvements required by the acts of Congress from interference by parties who claimed the land under the Town Site Act, but whose claims had been rejected by the Secretary of the Interior.[25] Where, however, the decision of a case depends upon the construction of the land laws, the suit arises under the laws of the United States.[26]

Actions upon bonds required by orders of Federal courts,[27] upon the bonds of deputy collectors,[28] cashiers of national banks[29] and Federal marshals,[30] or other public officers,[31] arise under the laws of the United States. A suit against a marshal for an abuse of Federal process against the defendant to the writ,[32] or for levying under a writ upon property claimed by a stranger to the suit, but which the marshal claims belonged to the defendant to the writ,[33] arises under the laws of the United States; but a suit against a marshal for a levy upon goods, which he does not claim to be the property of a person named in the writ, does not.[34] A suit was held to arise under the laws of the United States when brought against a private person for

Co., 49 Fed. R. 292; Robinson v. Anderson, 121 U. S. 522; Lamb v. Ewing, 54 Fed. R. 269; Dewey Min. Co. v. Miller, 96 Fed. R. 1; Montana O. P. Co. v. Boston & M. C. C. & S. M. Co. (C. C. A.), 85 Fed. R. 867. But see Nevada S. O. Co. v. Miller, 97 Fed. R. 681.

[24] Holland v. Hyde, 41 Fed. R. 877. But see Cates v. Producers' C. O. Co., 96 Fed. R. 7.

[25] King v. Lawson, 84 Fed. R. 209; Butler v. Shafer, 67 Fed. R. 161. But see Jones v. Florida, C. & P. R. Co., 41 Fed. R. 70.

[26] Dunton v. Muth, 45 Fed. R. 390, 395; Jones v. Florida, C. & P. R. Co., 41 Fed. R. 70; Murray v. Blue Bird Min. Co. Ld., 45 Fed. R. 885; Cheesman v. Shreve, 37 Fed. R. 86; Evans v. Durango Land & Coal Co., 80 Fed. R. 433; Butler v. Shafer, 67 Fed. R. 161; Pierce v. Molliken, 78 Fed. R. 196.

[27] Leslie v. Brown (C. C. A.), 90 Fed. R. 171. See Lamb v. Ewing, 54 Fed. R. 269, and *infra*, § 21.

[28] Crawford v. Johnson, Deady, 457.

[29] Walker v. Windsor Nat. Bank (C. C. A.), 56 Fed. R. 76.

[30] Feibelman v. Packard, 109 U. S. 421; Bachrack v. Norton, 132 U. S. 337.

[31] U. S. v. Belknap, 73 Fed. R. 19.

[32] Front St. Cable Ry. Co. v. Drake, 65 Fed. R. 539.

[33] Bock v. Perkins, 139 U. S. 628. See Buck v. Colbath, 3 Wall. 531. But in such a case the declaration need not allege that the defendant acted as marshal. Drake v. Paulhamus (C. C. A.), 66 Fed. R. 895.

[34] Buck v. Colbath, 3 Wall. 58.

wrongfully causing a marshal to levy a Federal execution upon the plaintiff's property, claimed by the defendants to belong to the judgment debtor.[35]

A suit against the receiver of a national bank to establish a claim against the corporation arises under the laws of the United States.[36] It was held that the receiver of a national bank appointed by the Comptroller could intervene and remove a suit instituted before his appointment against the bank and others to recover money fraudulently obtained, since it was a case "for the winding up of the affairs of the business."[37] But a bill against a national bank receiver and an executor to recover a legacy, where some of the decedent's assets were deposited in the bank, was dismissed at circuit as not arising under a law of the United States.[38]

Where either party is the receiver of a corporation created by an act of Congress, the suit arises under the laws of the United States.[39] So does a suit by or against the receiver of a State corporation appointed by a Federal court when the validity or construction of an order of that court is in question;[40] but otherwise, it seems, not a suit against such a receiver for negligence,[41] nor a suit by such a receiver to enforce a cause of action vested in the corporation before his appointment,[42] although in the latter case, at least, the Federal court may exercise a jurisdiction which is ancillary to that over the suit in which he was appointed.[43]

[35] Hurst v. Cobb, 61 Fed. R. 1. Original jurisdiction of suits against collectors of internal revenue was denied. Cincinnati Br. Co. v. Bettman, 102 Fed. R. 16.

[36] Auten v. U. S. Nat. Bank, 174 U. S. 125, 141; Sowles v. Witters, 43 Fed. R. 700. See Kennedy v. Gibson, 8 Wall. 488; Wichita Nat. Bank v. Smith (C. C. A.), 72 Fed. R. 568.

[37] Speckart v. German Nat. Bank, 85 Fed. R. 12.

[38] Wardens, etc. of St. Luke's Church v. Sowles, 51 Fed. R. 609. But see Speckart v. German Nat. Bank, 85 Fed. R. 12; Metropolitan T. Co. v. Columbus, S. & H. R. Co., 93 Fed. R. 689; Sonnentheil v. Christian M. Br. Co., 172 U. S. 401; Bartley v. Hayden, 74 Fed. R. 913.

[39] Texas & Pac. Ry. Co. v. Cox, 145 U. S. 593.

[40] Pope v. Louisville, N. A. & C. Ry. Co., 173 U. S. 573, 581; Board of Com'rs v. Peirce, 90 Fed. R. 764; *infra*, § 249.

[41] Bausman v. Dixon, 173 U. S. 113; Pope v. Louisville, N. A. & C. Ry. Co., 173 U. S. 573, 579; Gableman v. P. D. & E. Ry. Co., 179 U. S. 335; *infra*, § 249.

[42] Pope v. Louisville, N. A. & C. Ry. Co., 173 U. S. 573; *infra*, § 249.

[43] White v. Ewing, 159 U. S. 536; *infra*, §§ 21, 249.

A suit upon a judgment recovered in a Federal court is not necessarily a suit arising under the laws of the United States.[44] But it was held that a suit to enjoin a tax levy ordered by the mandamus of a Federal court,[45] and a suit where there was a dispute as to how far a State statute concerning liens upon land applied to a Federal judgment,[46] arose under the laws of the United States.

An action by an attorney for damages caused by his disbarment by a State court for language spoken in a Federal court does not.[47] A case does not arise under the laws of the United States simply because a Federal court has decided in another suit the questions of law which were involved.[48] A suit does not arise under the Constitution or laws of the United States unless the Federal question appears clearly, not merely inferentially,[49] upon the face of the plaintiff's pleadings in his statement of his own case.[50] His allegation that the defendant will set up a defense based upon a Federal statute or the Constitution of the United States will not bring the case within the Federal jurisdiction.[51] A Federal question raised for the first time by the defendant must be tried by the State court, subject to review by the Supreme Court of the United States.[52] It has been held that where the complaint set up a Federal question, but the answer disclaimed any controversy upon that point, the case should be dismissed or remanded for want of Federal

[44] Provident Sav. Soc. v. Ford, 114 U. S. 635; Metcalf v. Watertown, 128 U. S. 586. See Winter v. Swinburne, 8 Fed. R. 49, and *infra*, § 21. An issue whether full force and effect had been given to the judgment of a State court was held not to involve the construction of the Constitution of the United States. Merritt v. American Steel Barge Co. (C. C. A.), 75 Fed. R. 813.

[45] First Nat. Bank v. Society for Savings (C. C. A.), 80 Fed. R. 581.

[46] Cooke v. Avery, 147 U. S. 375; Sowles v. Witters, 46 Fed. R. 497.

[47] Green v. Elbert, 63 Fed. R. 308; Green v. Rogers, 56 Fed. R. 220.

[48] Leather Mf'rs Bank v. Cooper, 120 U. S. 778, 781.

[49] Hanford v. Davies, 163 U. S. 273; W. U. Tel. Co. v. Ann Arbor R. Co., 178 U. S. 239.

[50] Tennessee v. Union and Planters' Bank, 152 U. S. 454; Chappell v. Waterworth, 155 U. S. 102; Third St. S. Ry. Co. v. Lewis, 173 U. S. 457.

[51] Florida Cent. & P. R. Co. v. Bell, 176 U. S. 321; City Ry. Co. v. Citizens' St. R. Co., 166 U. S. 557; Montana O. P. Co. v. Boston & M. C. C. S. M. Co. (C. C. A.), 93 Fed. R. 274. But see Walla Walla City v. Walla Walla Water Works Co., 172 U. S. 1; Cox v. Gilmer, 88 Fed. R. 343.

[52] Tennessee v. Union and Planters' Bank, 152 U. S. 454, 462.

jurisdiction,[53] and that where the Federal cause of action fails, relief cannot be granted upon another ground.[54]

§ 18. Controversy between citizens of different States.— A controversy between citizens of different States is one in which every party upon one side is a citizen of a different State from every party upon the other.[1]

The citizenship of formal parties with no real interest in the controversy does not affect the jurisdiction.[2] Such are the husband of the plaintiff when made a defendant to a suit against another to enforce the trusts of a marriage settlement;[3] a State in a suit for the use of an individual brought upon a bond given by a public officer,[4] an administrator,[5] or an attaching creditor;[6] an agent[7] or attorney[8] of a corporation when a defendant to a suit against it seeking no relief against him; the sheriff and the commissioners of appraisal summoned by him when defendants to a suit to enjoin a corporation from prosecuting condemnation proceedings.[9]

Such have been held not to be a mere stakeholder in possession of property to recover which the suit is brought;[10] an ad-

[53] Robinson v. Anderson, 121 U. S. 522, 524; Crystal Springs L. & W. Co. v. City of Los Angeles, 82 Fed. R. 114.

[54] Larrowe-Loisette v. O'Loughlin, 88 Fed. R. 896.

§ 18. [1] Blake v. McKim, 103 U. S. 336.

[2] Removal Cases, 100 U. S. 457; Barney v. Latham, 103 U. S. 205; Harter v. Kernochan, 103 U. S. 562; Maryland v. Baldwin, 112 U. S. 490; Wormley v. Wormley, 8 Wheat. 421; Taylor v. Holmes, 14 Fed. R. 499; New Chester Water Co. v. Holly Mfg. Co. (C. C. A.), 58 Fed. R. 19, 26; *infra*, §§ 38, 51, 383, 384. But see Blackburn v. Portland G. M. Co., 175 U. S. 571; Pittsburg, C. & St. L. Ry. Co. v. B. & O. R. Co. (C. C. A.), 61 Fed. R. 705.

[3] Wormley v. Wormley, 8 Wheat. 421.

[4] Indiana ex rel. Stanton v. Glover, 155 U. S. 513. See National Bank v. Rutledge, 84 Fed. R. 400.

[5] Maryland v. Baldwin, 112 U. S. 490. See also Northman v. Wade, 77 Ga. 651.

[6] Wisconsin ex rel. v. Bowles Milling Co., 80 Fed. R. 161. So a marshal in such a suit upon a bond given to him. Wade v. Wortsman, 29 Fed. R. 754.

[7] Wood v. Davis, 18 How. 467; Brown v. Murray Nelson & Co., 43 Fed. R. 614; Overman Wheel Co. v. Pope Mfg. Co., 46 Fed. R. 577.

[8] Brown v. Murray Nelson & Co., 43 Fed. R. 614.

[9] Sioux City & D. M. Ry. Co. v. Chicago, M. & St. P. Ry. Co., 27 Fed. R. 770.

[10] Wilson v. Oswego Tp., 151 U. S. 56; Massachusetts & S. Constr. Co. v. Cane Creek Tp., 155 U. S. 283. But see Pacific R. Co. v. Ketchum, 101 U. S. 289, 298; Bacon v. Rives, 106 U. S. 99; N. Y. Constr. Co. v. Simon, 53 Fed. R. 14; Reeves v. Corning, 51 Fed. R. 774, 778, and cases cited.

ministrator with the will annexed in a suit for a construction of the will;[11] and a corporation in a suit by its mortgagee to cancel a contract made with it, although it was alleged that its assets were insufficient to pay the mortgage.[12]

In determining between whom the controversy exists, the court is not bound by the title of the cause, or the form of the pleadings, but should examine the record, ascertain the matter in dispute, and arrange the parties on opposite sides of the same according to the facts, no matter what their technical place as plaintiffs or defendants may be.[13] In a suit by taxpayers against county officers and bondholders to enjoin payment of the bonds, the defendant officers were presumed to take the same side of the controversy as the taxpayers.[14] It has been held that, in a suit by a bondholder to enforce a right after his trustee has refused to sue upon the same, the defendant trustee is upon the same side of the controversy as the plaintiff,[15] unless the latter seeks some relief antagonistic to the other beneficiaries of the trust,[16] or perhaps when he claims some substantial relief against the trustee. Where, upon the foreclosure of a second mortgage, the plaintiff claimed that the first mortgage had been paid, and the first mortgagee, who was a defendant to that foreclosure, filed a cross-bill to foreclose his prior mortgage, it was held that in the controversy upon such cross-bill the mortgagor and the second mortgagee,

[11] Security Co. v. Pratt, 64 Fed. R. 405.

[12] Consol. Water Co. v. Babcock, 76 Fed. R. 243.

[13] Removal Cases, 100 U. S. 457, 468; Pacific R. Co. v. Ketchum, 101 U. S. 289; Barney v. Latham, 103 U. S. 205; Carson v. Hyatt, 118 U. S. 279, 286; Brown v. Murray Nelson & Co., 43 Fed. R. 614; Anderson v. Bowers, 40 Fed. R. 708; Cilley v. Patten, 62 Fed. R. 498; Board of Trustees v. Blair, 70 Fed. R. 414; Blacklock v. Small, 127 U. S. 96; Mangels v. Donau Br. Co., 53 Fed. R. 513; Oberlin College v. Blair, 70 Fed. R. 414. But see Reavis v. Reavis, 98 Fed. R. 145.

[14] Harter v. Kernochan, 103 U. S. 562; Anderson v. Bowers, 40 Fed. R. 708.

[15] Pacific R. Co. v. Ketchum, 101 U. S. 289; Blacklock v. Small, 127 U. S. 96; Shipp v. Williams (C. C. A.), 62 Fed. R. 4; First Nat. Bank v. Radford Tr. Co. (C. C. A.), 80 Fed. R. 569, 573; Barry v. Mo., K. & T. Ry. Co., 27 Fed. R. 1. But see Bowdoin College v. Merritt, 63 Fed. R. 213; Reinach v. Atlantic & G. W. R. Co., 58 Fed. R. 33; Kildare Lumber Co. v. National Bank (C. C. A.), 69 Fed. R. 2.

[16] First Nat. Bank v. Radford Tr. Co., 80 Fed. R. 569, 571, 573; Rust v. Brittle Silver Co. (C. C. A.), 58 Fed. R. 611; Kildare Lumber Co. v. National Bank (C. C. A.), 69 Fed. R. 2.

who was the original plaintiff, were on the same side and opposed to the cross-complainant.[17] In a suit by a mortgagee to protect the mortgaged property, a defendant mortgagor is upon the plaintiff's side of the controversy unless affirmative relief is sought against him.[18] It was held that, in a suit for specific performance, one of the joint vendors who wished to have the sale perfected was properly made a co-plaintiff with the vendees and was on their side of the controversy.[19]

When at the time a bill is filed the court has no jurisdiction, jurisdiction cannot subsequently be conferred by an amendment striking out a party plaintiff who was properly and necessarily made such at the commencement of the suit;[20] but in one case the court retained jurisdiction by allowing an amendment which made one of the original plaintiffs a defendant.[21] When they are not indispensable parties, jurisdiction may be retained upon a discontinuance or dismissal as regards defendants who are citizens of the same State as the plaintiff;[22] but the resignation after suit brought of a defendant trustee,[23] and the filing of a disclaimer by a defendant,[24] who were citizens of the complainant's State, were held not to save the jurisdiction. Jurisdiction is not lost because a defendant ceases to resist the plaintiff's demand;[25] nor by the addition by amendment,[26]

[17] Wolcott v. Sprague, 55 Fed. R. 545.

[18] Consol. Water Co. v. Babcock, 76 Fed. R. 243; Boston S. D. & Tr. Co. v. Racine, 97 Fed. R. 817; Old Colony Tr. Co. v. Atlanta Ry. Co., 100 Fed. R. 798. *Cf.* Mercantile Tr. & D. Co. v. Collins P. & B. R. Co., 99 Fed. R. 812.

[19] Megibben's Adm'rs v. Perin, 49 Fed. R. 183. Approved as to this point upon reversal, Perin v. Megiben, 53 Fed. R. 86, 91.

[20] Anderson v. Watt, 138 U. S. 694. But see Hicklin v. Marco (C. C. A.), 56 Fed. R. 549; Whittle v. Artis, 55 Fed. R. 919.

[21] Conolly v. Taylor, 2 Peters, 556.

[22] Beebe v. Louisville, N. O. & T. R. Co., 39 Fed. R. 481, 484; Morse v. South, 80 Fed. R. 206, 207; Claiborne v. Waddel, 50 Fed. R. 368; Hicklin v. Marco (C. C. A.), 56 Fed. R. 549; Horn v. Lockhart, 17 Wall. 570; Bane v. Keefer, 66 Fed. R. 610; Mason v. Dullingham, 82 Fed. R. 689; Grove v. Grove, 93 Fed. R. 865; Hopkins v. Oxley Stave Co., 83 Fed. R. 912; Smith v. Consumers' C. O. Co., 86 Fed. R. 359; Tug R. C. & S. Co. v. Brigel, 86 Fed. R. 818; *infra*, §§ 19, 391.

[23] Ruohs v. Jarvis-Conklin Mtg. Tr. Co., 84 Fed. R. 518.

[24] Wetherby v. Stinson, 62 Fed. R. 193. But see Frazer Lubricator Co. v. Frazer, 23 Fed. R. 805.

[25] Park v. N. Y., L. E. & W. R. Co., 70 Fed. R. 641.

[26] Ober v. Gallagher, 93 U. S. 199, 206; Stewart v. Dunham, 115 U. S. 61, 64; Phelps v. Oakes, 117 U. S. 236; Hardenberg v. Ray, 151 U. S. 112.

or intervention,[27] of new parties whose citizenship would have prevented their original joinder in the suit; nor by the transfer of the plaintiff's interest to a citizen of the same State as the defendant.[28]

§ 19. Citizenship.— If there are no other grounds of jurisdiction, the Federal courts do not take cognizance of a controversy between two aliens;[1] nor of one between a citizen of the District of Columbia,[2] or a citizen of a Territory,[3] and a citizen of a State. A suit brought by a State against one of its own citizens, or against a citizen of another State, cannot, independently of other grounds, be maintained in the Circuit Court of the United States.[4] If one of the parties sues or is sued as a trustee,[5] receiver,[6] executor or administrator,[7] his own

But see Weaver v. Kelly, 92 Fed. R. 417; Mangels v. Donau Br. Co., 53 Fed. R. 513.

[27] Park v. N. Y., L. E. & W. R. Co. (S. D. N. Y.), 70 Fed. R. 641; Society of Shakers v. Watson (C. C. A.), 68 Fed. R. 730; Osborne & Co. v. Barge, 80 Fed. R. 805; United El. S. Co. v. La. El. L. Co., 68 Fed. R. 673; Henderson v. Goode, 49 Fed. R. 887; Belmont Nail Co. v. Col. I. & S. Co., 46 Fed. R. 836; *infra*, § 201. *Contra*, Forest Oil Co. v. Crawford (C. C. A., Third Ct.), 101 Fed. R. 849. See also Clyde v. Richmond & D. R. Co., 65 Fed. R. 336. In a case where the jurisdiction had been saved by dismissing the bill as to certain unnecessary defendants, whose citizenship was the same as that of the complainant, it was held that they could subsequently be joined upon their own petition of intervention without defeating the jurisdiction. Sioux City T., R. R. & W. Co. v. Trust Co. of N. A. (C. C. A.), 82 Fed. R. 124; s. c., 173 U. S. 99.

[28] Jarhoe v. Templer, 38 Fed. R. 218; Glover v. Shepperd, 21 Fed. R. 481. *Contra*, Adams Exp. Co. v. Denver & R. G. Ry. Co., 16 Fed. R. 712.

§ 19. [1] Mossman v. Higginson, 4 Dall. 12; Rateau v. Bernard, 8 Blatchf. 244.

[2] Hepburn v. Ellzey, 2 Cranch, 445; Wescott v. Fairfield, Pet. C. C. 45; Barney v. Baltimore, 1 Hughes, 118; Cameron v. Hodges, 127 U. S. 322; Hooe v. Jamieson, 166 U. S. 395.

[3] New Orleans v. Winter, 1 Wheat. 9; Snead v. Sellers (C. C. A.), 66 Fed. R. 871; Cameron v. Hodges, 127 U. S. 322. It has been held that a citizen of the island of Cuba is an alien. Betancourt v. Mutual R. F. L. Ass'n, 101 Fed. R. 305.

[4] Alabama v. Wolffe, 18 Fed. R. 336; Postal Tel. C. Co. v. Alabama, 155 U. S. 482; Stone v. South Carolina, 117 U. S. 430; Indiana v. Tolleston Club, 53 Fed. R. 18; Minnesota v. Guaranty Tr. & S. D. Co., 73 Fed. R. 914.

[5] Dodge v. Tulley, 144 U. S. 451.

[6] Davies v. Lathrop, 12 Fed. R. 353; Farlow v. Lea, 2 C. L. R. 329; Brisenden v. Chamberlain, 53 Fed. R. 307; Snead v. Sellers (C. C. A.), 66 Fed. R. 871.

[7] Continental L. Ins. Co. v. Rhoads, 119 U. S. 237; Bradford v. Williams, 3 How. 574; Browne v. Browne, 1 Wash. 429; Harper v. Norfolk & W. R. Co., 36 Fed. R. 102.

citizenship, not that of his beneficiaries nor the location of the trust estate, is alone to be considered. When an infant sues by his next friend or special guardian, the citizenship of the infant alone is to be considered.[8] A corporation is conclusively presumed to be composed of citizens of the State or Nation which chartered it, or from which it derives its powers.[9] A municipal corporation is treated as a citizen of the State within which it is situated.[10]

This presumption is not made in the case of unincorporated joint-stock companies[11] or copartnerships, whether limited[12] or general, even in States where the law authorizes them to sue and be sued in the name of an officer, or in the copartnership name. Where a corporation is chartered by two or more States, the former rule seems to have been that it should be treated for the purpose of jurisdiction as composed of citizens of the State where the suit was brought.[13] The rule now seems to be: that for purposes of jurisdiction it is conclusively presumed to be composed of citizens of the State which first gave it corporate existence; but that, unless the case arises under the Constitution or laws of the United States, the Federal court cannot adjudicate its rights or liabilities as a corporation of a State, citizens of which are upon the other side of the controversy.[14] The present rule as to consolidated corporations is not clearly settled.[15] A national bank is considered as if it

[8] Woolridge v. McKenna, 8 Fed. R. 650; Voss v. Neinberger, 68 Fed. R. 947.

[9] Louisville, C. & C. R. Co. v. Letson, 2 How. 497; Marshall v. Baltimore & O. R. Co., 16 How. 314; Muller v. Dows, 94 U. S. 446; Steamship Co. v. Tugman, 106 U. S. 118. For an able criticism of these rulings, see the address of Hon. Alfred Russell before the American Bar Association in August, 1891 (25 Am. Law Rev. 795–808).

[10] Cowles v. Mercer County, 7 Wall. 118; City of Ysleta v. Canda, 67 Fed. R. 6.

[11] Chapman v. Barney, 129 U. S. 677.

[12] Great So. F. P. H. Co. v. Jones, 177 U. S. 449. But see Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566.

[13] Ohio & M. R. Co. v. Wheeler, 1 Black, 286; Railway Co. v. Whitton, 13 Wall. 270; Muller v. Dows, 94 U. S. 444; Memphis & C. R. Co. v. Alabama, 107 U. S. 581.

[14] Louisville, N. A. & C. Ry. Co. v. Louisville Tr. Co., 174 U. S. 552, 563, 576, 577. See also St. Louis & S. F. Ry. Co. v. James, 161 U. S. 545; St. Joseph & G. I. R. Co. v. Steele, 167 U. S. 659; Taylor v. Illinois Cent. R. Co., 89 Fed. R. 119; Harv. Law Rev., vol. XII. p. 350.

[15] See Louisville, N. A. & C. Ry. Co. v. Louisville Tr. Co., 174 U. S. 558; Graham v. Boston & E. R. Co., 118

were a citizen of the State in which it is located.[16] The location of the principal place of business of a corporation, which is not a national bank, does not affect the jurisdiction.[17] The filing of a declaration of his intention to become a citizen of the United States does not terminate a party's alienage, although he is permitted by the laws of the State of his residence to vote and hold office.[18] An allegation that a party was "a citizen of London, England," was held to be insufficient to show that he was an alien.[19] Residence is not conclusive evidence of citizenship.[20] An exercise of the right of

U. S. 161; Nashua & L. R. Co. v. Boston & L. R. Co,, 136 U. S. 356; Paul v. B. & O. R. Co., 44 Fed. R. 513; Baldwin v. Chicago & N. W. R. Co., 86 Fed. R. 167.

[16] 24 St. at L., p. 554; First Nat. Bank v. Forest, 40 Fed. R. 705; Farmers' Nat. Bank v. McElhinney, 42 Fed. R. 801; Petri v. Commercial Nat. Bank, 142 U. S. 644; *supra*, § 17.

[17] Phinizy v. Augusta & K. R. Co., 56 Fed. R. 273, 276.

[18] Lanz v. Randall, 4 Dill. 425; Maloy v. Duden, 25 Fed. R. 673.

[19] Stuart v. Easton, 156 U. S. 46. *Cf.* Rondot v. Tp. of Rogers (C. C. A.), 79 Fed. R. 676; Jennes v. Laudes, 84 Fed. R. 73; s. c., 85 Fed. R. 801. But see Betancourt v. Mutual R. F. L. Ass'n, 101 Fed. R. 805.

[20] Shelton v. Tiffin, 6 How. 163, 185; Reynolds v. Adden, 186 U. S. 348, 352; Kemna v. Brockhaus, 5 Fed. R. 762, 763, 764, 766, 767, per Dyer, J.:

"The general rule upon the subject of citizenship is well settled. It is that, 'in order to give jurisdiction to the courts of the United States, the citizenship of the party must be founded on a change of domicile, and permanent residence in the State to which he may have removed from another State. Mere residence is *prima facie* evidence of such change, although when it is explained and shown to have been for temporary purposes, the presumption is destroyed. The intention is to be collected from acts.' Lessee of Butler v. Farnsworth, 4 Wash. 101; 1 Abb. (U. S.) Pr. 211. 'If a citizen of one State think proper to change his domicile, and to remove himself and family . . . into another State, with a *bona fide* intention of abandoning his former place of residence, and to become an inhabitant or resident of the State to which he removes, he becomes, immediately upon such removal, accompanied with such intention, a resident citizen of that State within the meaning of the provision of the Constitution relative to the jurisdiction of the Federal courts, and may maintain an action in the Circuit Court of the State which he has abandoned. . . . Time in relation to his new residence, occupation, a sudden removal back after instituting a suit, and the like, are circumstances which may be relied upon to show that his first removal was not *bona fide* or permanent, but will not disprove his citizenship in the place of his new domicile, if the jury are satisfied that his first removal was *bona fide* and without an intention of returning.' Cooper v. Galbraith, 3 Wash. 564. 'If there has been an actual removal, with intent to make a permanent residence, and the acts

suffrage by a citizen of the United States is conclusive evidence of his citizenship.[21] Less evidence may, however, be sufficient to establish a change of citizenship.[22] A statement in a document signed by him that a person is "of" a specified State is evidence that he is a citizen of the same,[23] but does not estop him from proving the contrary.[24] It has been held that a party may testify that up to a certain date he was a citizen of a specified State, and that others cannot, but must confine their testimony to facts from which his citizenship can be inferred.[25] It has been held that a husband and wife who are not living apart under a legal separation cannot be citizens of different States.[26] The fact that a plaintiff has changed his residence and citizenship for the purpose of bringing suit in the Federal court does not divest the jurisdiction if the change has actually

of the party correspond with the purpose, the change of domicile is completed, and the law forces upon him the character of a citizen of the State where he has chosen his domicile.' Butler v. Farnsworth, *supra*. A temporary return to one's former place of residence, with views and for objects merely temporary, does not revive a former citizenship. Burnham v. Rangely, 1 Woodb. & M. 7. 'If the change of residence or citizenship is apparent only, and there has been, in fact, no change of residence, but only a transfer of apparent residence, *animo revertendi*, to give color of jurisdiction in a suit in the State of actual residence, it may not avail; but, where there is an actual change of residence and citizenship before suit brought, the motive to such change is not material, even if it was a desire to give capacity to sue in the courts of the United States.' Pond v. Vermont Valley R. Co., 12 Blatchf. 293. So, to effect a change of citizenship from one State to another, there must be an actual removal, an actual change of domicile, with a *bona fide* intention of abandoning the former place of residence and establishing a new one, and the acts of the party must correspond with such purpose. . . . The question is one of fixed law and fact. . . . It is apparent that the circumstance of the plaintiff's return to Milwaukee in December was one which, if unexplained, would tend to throw doubt upon the permanency of the alleged settlement in Minnesota. But if her return was for an object merely temporary, as she alleges, then her domiciliary *status* in that State would not be affected."

[21] Rabaud v. D'Wolf, 1 Paine, 580; State Sav. Ass'n v. Howard, 31 Fed. R. 433; McDonald v. Salem C. F. Mills Co., 31 Fed. R. 577.

[22] Shelton v. Tiffin, 6 How. (U. S.) 163, 185; Marks v. Marks, 75 Fed. R. 321.

[23] Rucker v. Bolles (C. C. A.), 80 Fed. R. 504.

[24] Reynolds v. Adden, 136 U. S. 348.

[25] Rucker v. Bolles, 80 Fed. R. 504; Lehigh Mining & Mfg. Co. v. Kelly, 160 U. S. 327.

[26] Nichols v. Nichols, 92 Fed. R. 1.

been made[27] without any intention to return.[28] But where the stockholders of a corporation reincorporated in another State solely for that purpose, it was held that the case should be dismissed for want of jurisdiction.[29] It has been held that when the necessary difference of citizenship is duly alleged and is traversed, the defendant has the burden of proof to show that it does not exist.[30] A change of citizenship after the jurisdiction has once attached will not divest it;[31] even, it was held, in case of a change of citizenship made before an amended bill was filed.[32] A dismissal of the bill as to parties not indispensable to the suit, or an amendment dropping them, may cure a defect of jurisdiction,[33] even, it was held, where they were restored a few days later upon their petition for intervention.[34]

§ 20. Under grants of different States.—Where there is a controversy between citizens of the same State claiming land under grants of different States, it seems that the Circuit Court of the United States has jurisdiction irrespective of the amount involved.[1] Where one party claimed land under a grant of

[27] Briggs v. French, 2 Sumn. 251, 255, 256; Catlett v. Pacific Ins. Co., 1 Paine, 594; Cooper v. Galbraith, 3 Wash. C. C. 546, 553; Case v. Clarke, 5 Mason, 70; Robertson v. Carson, 19 Wall. 94, 106.

[28] Morris v. Gilmer, 129 U. S. 315; Ala. G. S. R. Co. v. Carroll (C. C. A.), 84 Fed. R. 772; Kingman v. Holthaus, 59 Fed. R. 805; King v. U. S., 59 Fed. R. 9; Chambers v. Prince, 75 Fed. R. 176; Allen v. So. Cal. Ry. Co., 70 Fed. R. 370. An intention to return unaccompanied by acts does not restore the former residence after it has been actually changed. Pacific M. L. I. Co. v. Tompkins (C. C. A.), 101 Fed. R. 539.

[29] Lehigh Min. & Mfg. Co. v. Kelly, 160 U. S. 327.

[30] Foster v. Cleveland, C., C. & St. L. Ry. Co., 56 Fed. R. 434; Sheppard v. Graves, 56 Fed. R. 437; Nat. M. Acc. Ass'n v. Sparks (C. C. A.), 88 Fed. R. 225.

[31] Ober v. Gallagher, 93 U. S. 199, 206; Stewart v. Dunham, 115 U. S. 61, 64; Phelps v. Oakes, 117 U. S. 236; Hardenbergh v. Ray, 151 U. S. 112. But see Weaver v. Kelly, 92 Fed. R. 417; Mangels v. Donau B. Co., 53 Fed. R. 513.

[32] Tug River C. & S. Co. v. Brigel, 86 Fed. R. 818.

[33] Powers v. Chesapeake & O. Ry. Co., 169 U. S. 92; Sioux City T. R. & W. Co. v. Trust Co. of N. Am., 82 Fed. R. 124; Hopkins v. Oxley S. Co., 83 Fed. R. 912; Oxley S. Co. v. Coopers' Int. Union, 72 Fed. R. 695; Tug River C. & S. Co. v. Brigel, 86 Fed. R. 818; *supra*, § 18; *infra*, § 391.

[34] Sioux City T. & W. Co. v. Trust Co. of N. Am. (C. C. A.), 82 Fed. R. 124.

§ 20. [1] See Holt on Concurrent Jurisdiction, § 60; In re Hohorst, 150 U. S. 653, 659, 660; In re Keasby & Mattison Co., 160 U. S. 221, 230.

New Hampshire made when Vermont was a part of that State, and the other under a grant from Vermont made after their separation, it was held that the controversy arose between persons claiming land under grants of different States.[2] Where a controversy is founded upon conflicting grants of different States, the Federal courts have jurisdiction irrespective of the equitable title of the parties before either grant.[3]

§ 21. Ancillary jurisdiction.—After a Federal court has acquired jurisdiction, through the existence of the necessary difference of citizenship between the original parties, ancillary proceedings may be therein instituted, although parties upon the different sides of the controversy are citizens of the same State and there is no other ground of Federal jurisdiction.[1] "The question is not whether the proceeding is supplemental and ancillary, or is independent and original, in the sense of the rules of equity pleading, but whether it is supplemental and ancillary, or is to be considered entirely new and original, in the sense which this court has sanctioned with reference to the line which divides the jurisdiction of the Federal courts from that of the State courts."[2] Thus, not only can a bill of revivor or a supplemental bill,[3] or a cross-bill,[4] be maintained in a Federal court which had jurisdiction of the original litigation; but so can a bill to enjoin the prosecution of proceedings therein at law or in equity,[5] or a bill to restrain or to regulate,[6] or to set aside,[7]

[2] Pawlet v. Clark, 9 Cranch, 292; Colson v. Lewis, 2 Wheat. 377.

[3] Colson v. Lewis, 2 Wheat. 377, 379.

§ 21. [1] Dunn v. Clarke, 8 Pet. 1; Clarke v. Mathewson, 12 Pet. 163; Freeman v. Howe, 24 How. 450, 460; Minnesota Co. v. St. Paul Co., 2 Wall. 609; Jones v. Andrews, 10 Wall. 327; Krippendorf v. Hyde, 110 U. S. 276; Pacific R. of Mo. v. Mo. P. R. Co., 111 U. S. 505, 522; Dewey v. W. F. G. C. Co., 128 U. S. 329; Gumbel v. Pitkin, 124 U. S. 131; Seymour v. Phillips & C. Const. Co., 7 Biss. 460. But see Christmas v. Russell, 14 Wall. 69.

[2] Miller, J., in Minnesota Co. v. St. Paul Co., 2 Wall. 609, 633.

[3] Clarke v. Mathewson, 12 Pet. 164.

[4] Morgan's La. & T. R. & St. Co. v. Texas Cent. Ry. Co., 137 U. S. 171. See *infra*, § 172; Central Trust Co. v. Bridges, 57 Fed. R. 753.

[5] Bradshaw v. Miners' Bank (C. C. A.), 81 Fed. R. 902; Krippendorf v. Hyde, 110 U. S. 276. So can a bill for the appointment of a receiver of rents and profits pending an ejectment suit in the Federal court. Ulman v. Clark, 75 Fed. R. 868.

[6] Dunn v. Clark, 8 Pet. 1; Freeman v. Howe, 24 How. 450, 460; Jones v. Andrews, 10 Wall. 327; Krippendorf v. Hyde, 110 U. S. 276; Johnson v. Christian, 125 U. S. 642.

[7] Pacific R. of Mo. v. Mo. P. R. Co., 111 U. S. 505, 522; Foster v. Mansfield,

or to obtain a judicial construction,[8] or to enforce by injunction,[9] *scire facias*[10] or otherwise,[11] a judgment or decree, or a bond[12] of a Federal court; even where other incidental relief is prayed.[13] A bill for the reformation of a policy of insurance is ancillary to an action upon such policy.[14] A creditor's bill between citizens of the same State founded upon a decree in admiralty has been held not within the jurisdiction of a Federal court.[15] An original bill to foreclose a mortgage,[16] or a mechanic's lien[17] or other lien[18] upon a railway or other property, or upon the proceeds of property in the possession of a receiver appointed by a Federal court in a prior suit, to foreclose a prior or subsequent mortgage, or otherwise in the possession of such court, can be brought in such Federal court

C. & L. M. R. Co., 86 Fed. R. 627; s. c., 146 U. S. 88; Carey v. Houston & T. C. Ry. Co., 161 U. S. 115; Maitland v. Gibson, 79 Fed. R. 136; Lacanagrues v. Chapins, 144 U. S. 119; Broadis v. Broadis, 86 Fed. R. 951; Ladd v. West, 55 Fed. R. 353; Hill v. Kuhlman (C. C. A.), 87 Fed. R. 498; McDonald v. Seligmans, 81 Fed. R. 753; Richardson v. Loree (C. C. A.), 94 Fed. R. 875.

[8] Minnesota Co. v. St. Paul Co., 2 Wall. 609; Jenks v. Brewster, 96 Fed. R. 625.

[9] Railroad Co. v. Chamberlain, 6 Wall. 748; Root v. Woolworth, 150 U. S. 401. So can a bill in aid of an execution or attachment. Lant v. Manley (C. C. A.), 75 Fed. R. 627. But where a railroad had been sold under a decree of foreclosure by a Federal court, it was held that such court had no jurisdiction over a subsequent suit to restrain the enforcement of a State judgment of ejectment obtained by a plaintiff who was not a party to the foreclosure. Central Trust Co. v. Grantham, 83 Fed. R. 540.

[10] Pullman's P. C. Co. v. Washburn, 66 Fed. R. 790; s. c. in C. C. A., 76 Fed. R. 1005; Lafayette County v. Wonderly (C. C. A.), 92 Fed. R. 813.

[11] Maitland v. Gibson, 79 Fed. R. 136. But see Central Trust Co. v. Grantham, 83 Fed. R. 540.

[12] Lamb v. Ewing, 56 Fed. R. 269; Leslie v. Brown, 95 Fed. R. 171.

[13] Hill v. Kuhlman (C. C. A.), 87 Fed. R. 498.

[14] Rosenbaum v. Council B. Ins. Co., 87 Fed. R. 724; Abraham v. North G. F. Ins. Co., 87 Fed. R. 731.

[15] Winter v. Swinburne, 8 Fed. R. 49. See Provident Savings Soc. v. Ford, 114 U. S. 635; Metcalf v. Watertown, 128 U. S. 586; *supra*, § 17.

[16] Morgan's L. & T. R. & S. S. Co. v. Texas Cent. Ry. Co., 137 U. S. 171; Farmers' L. & Tr. Co. v. Houston & T. C. Ry. Co., 44 Fed. R. 115; Carey v. Houston, T. & C. R. Co., 52 Fed. R. 671; Compton v. Jesup, 68 Fed. R. 263; Toledo, St. L. & K. C. Ry. Co. v. Continental T. R. Co. (C. C. A.), 95 Fed. R. 497.

[17] Central Tr. Co. v. Bridges (C. C. A.), 57 Fed. R. 753.

[18] Blake v. Pine M. L. & C. Co. (C. C. A.), 76 Fed. R. 624; Central Tr. Co. v. Benedict (C. C. A.), 78 Fed. R. 198; Central Tr. Co. v. Carter (C. C. A.), 78 Fed. R. 225. As to jurisdiction by cross-bill, see also Everett v. Independent School District, 102 Fed. R. 529; Brooks v. Laurent (C. C. A.), 98 Fed. R. 647; *infra*, §§ 170, 173.

independent of the citizenship of the parties, even after sale in the former suit. After a Federal court has appointed a receiver, it has ancillary jurisdiction over all suits brought by him irrespective of the amount involved.[19] He cannot, however, remove into such a court all suits brought against him.[20] It has been held at Circuit that a suit pending against the corporation at the time of the receivership may, on the petition of the receiver, be removed into the Federal court, at least when the plaintiff has intervened there, although original jurisdiction over the same could not have been entertained.[21] Where assets are in the course of administration, all persons entitled to participate may come in under the jurisdiction acquired between the parties by ancillary or supplemental pleading, even though jurisdiction would be lacking if said proceedings had been originally and independently prosecuted.[22] It has been held that a person, whose citizenship if an original party would have deprived the court of jurisdiction, cannot intervene when the court has possession of no fund or property in which he is interested.[23] It has been held at Circuit that a bill cannot thus be sustained, irrespective of the citizenship of the parties, when filed to set aside for fraud, subsequent to its entry, the decree of the Federal court or a contract affecting such decree,[24] nor when filed to set aside for fraud a stipulation and decree in a former suit, the defendants to the bill being neither parties to the former suit nor the personal representatives of such parties, but trustees created by a defendant to such suit after the decree, and where none of the property affected by the former suit was within the custody of the court;[25] nor when filed against defendants to a former decree and a third party to whom it was alleged that lands, the subject-

[19] White v. Ewing, 159 U. S. 53; Pope v. Louisville, N. A. & C. Ry. Co., 173 U. S. 573; Connor v. Alligator L. Co., 98 Fed. R. 155.

[20] Gableman v. Peoria, Decatur & Evansville Ry. Co., 179 U. S. 335; Baggs v. Martin, 179 U. S. 206; *supra*, §§ 15, 17.

[21] Rice v. Durham Water Co., 91 Fed. R. 433.

[22] Fuller, C. J., in Rouse v. Letcher, 156 U. S. 47, 49. See note 18, *supra*; and Henderson v. Goode, 49 Fed. R. 887; *infra*, § 201.

[23] Seligman v. Santa Rosa, 81 Fed. R. 524; United El. S. Co. v. La. El. L. Co., 68 Fed. R. 673.

[24] Yeatman v. Bradford, 44 Fed. R. 536.

[25] Ralston v. Sharon, 51 Fed. R. 702.

matter of the former suit, were conveyed prior to the commencement of the same.[26]

Conversely, there is a similar limitation upon the jurisdiction of the Federal courts. This is well explained in the following extract from an opinion by Bradley, J.: "The question presented with regard to the jurisdiction of the Circuit Court is, whether the proceeding to procure nullity of the former judgment in such a case as the present is or is not in its nature a separate suit, or whether it is a supplementary proceeding, so connected with the original suit as to form an incident to it, and substantially a continuation of it. If the proceeding is merely tantamount to the common-law practice of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review, or an appeal, it would belong to the latter category, and the United States court could not properly entertain jurisdiction of the case.[27] Otherwise, the Circuit Courts of the United States would become invested with power to control the proceedings in the State courts, or would have appellate jurisdiction over them in all cases where the parties are citizens of different States. Such a result would be totally inadmissible. On the other hand, if the proceedings are tantamount to a bill in equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding, and, according to the doctrine laid down in *Gaines v. Fuentes*,[28] the case might be within the cognizance of the Federal courts. The distinction between the two classes of cases may be somewhat nice, but it may be affirmed to exist. In the one class there would be a mere revision of errors and irregularities, or of the legality and correctness of the judg-

[26] Anglo Florida P. H. Co. v. McKibben, 65 Fed. R. 529. After a final decree granting damages for the injury to a street railway by the construction of another railroad, where the jurisdiction had attached because a constitutional question was involved, Mr. Justice Brewer refused to take jurisdiction of a supplemental bill to enjoin the construction of the rival railroad upon other grounds, none of which presented a Federal question. Omaha H. R. Co. v. Cable T. W. Co., 83 Fed. R. 689. See also Montgomery v. McDermott, 99 Fed. R. 502.

[27] Graver v. Faurot, 64 Fed. R. 241; Little Rock Ry. Co. v. Burke, 66 Fed. R. 83. But see Northern Pac. Ry. Co. v. Kurtzman, 82 Fed. R. 241.

[28] 92 U. S. 10. See Arrowsmith v. Gleason, 129 U. S. 86; Robb v. Vo, 155 U. S. 13; Hatch v. Ferguson, 52 Fed. R. 833; Davenport v. Moore, 74 Fed. R. 945.

ments and decrees of the State courts, and in the other class the investigation of a new case arising upon new facts, although having relation to the validity of an actual judgment or decree, or the party's right to claim any benefit by reason thereof."[29] A suit to make the judgment or decree of a State court the judgment or decree of the Federal court, respectively, can be maintained at common law[30] and in equity.[31] Proceedings supplementary to execution under the judgment of a State court authorized by State statutes against a judgment debtor or third persons cannot be instituted in or removed to the Federal courts, although a creditor's bill may be.[32] A petition, after judgment in a State court, by plaintiff in ejectment to have the defendant's damages allowed to him, is a mere incident to the ejectment suit and the Federal courts can take no jurisdiction of it.[33] It has been held that a bill cannot be maintained to set aside or interfere with the enforcement of an interlocutory decree in a cause pending in another court, when such decree is not a contempt of a Federal court.[34]

The dependence of an ancillary suit upon an original suit for purposes of jurisdiction does not throw both cases into hotchpot, and dispense with the ordinary rules of pleading and practice as to parties proper and necessary to each cause of action. The parties to the original bill have no more right to intervene in the dependent cause than if the court had independent jurisdiction of the same; and after jurisdiction has been acquired, the pleadings, practice and proceedings are pursued exactly as if it were an original suit.[35] The court does not in the second suit take judicial notice of the pleadings or proceedings in the former litigation, unless they are formally put in evidence.[36]

§ 22. Limitations upon jurisdiction by residence.— The Judiciary Act of 1887 limits the jurisdiction of the Circuit

[29] Barrow v. Hunton, 99 U. S. 80, 82. See Furnald v. Glenn, 56 Fed. R. 872.

[30] Barr v. Simpson, Baldwin, 543.

[31] See Davis v. Davis, 65 Fed. R. 880.

[32] Webber v. Humphreys, 5 Dill. 223; Poole v. Thatcherdeft, 19 Fed. R. 49; Buford v. Strother, 3 McCrary, 253; s. c., 10 Fed. R. 406; Flash v. Dillon, 22 Fed. R. 1.

[33] Chapman v. Barger, 4 Dillon, 587.

[34] Furnald v. Glenn (C. C. A.), 64 Fed. R. 49.

[35] Continental Tr. Co. v. Toledo, St. L. & K. C. R. Co., 82 Fed. R. 642, 645, per Taft, J.

[36] Richardson v. Loree, 94 Fed. R. 375. But see *infra*, § 264.

Courts of the United States as follows: "But no person shall be arrested in one district for trial in another in any civil action before a Circuit or District Court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."[1]

This limitation as to the residence of the defendant does not apply to a suit against an alien, who may be sued in any district where he can be served with process;[2] nor to the case of an alien corporation even where the State statute deprives its courts of jurisdiction.[3] An alien cannot sue a citizen of the United States except in the district which the defendant inhabits, where the jurisdiction depends upon the alienage.[4] The limitation does not apply to a suit for the infringement of a patent[5] or of a copyright;[6] nor, it has been said, to any case of which the Federal courts have exclusive jurisdiction.[7] In all these cases the defendant may be sued wherever he can be served, except in a patent case, where the defendant can only be sued in the district where his infringement occurred, and he has a regularly established place of business; or else in the district of which he is an inhabitant.[8] The rule is otherwise in trade-mark cases.[9] Where the jurisdiction depends upon the existence of a Federal question and is concurrent with that of the State courts, the defendant must be sued in the district which he inhabits;[10] but where it depends upon citizenship

§ 22. [1] Act of March 3, 1887, sec. 1, 24 St. at L. 522; as amended, 25 St. at L. 433.

[2] In re Hohorst, 150 U. S. 653; Barrow S. S. Co. v. Kane, 170 U. S. 100.

[3] Barrow S. S. Co. v. Kane, 170 U. S. 100.

[4] Galveston, H. & S. A. Ry. Co. v. Gonzales, 151 U. S. 496.

[5] 29 St. at L. 695; Smith v. Sargent Mfg. Co., 67 Fed. R. 801; In re Hohorst, 150 U. S. 653, 661.

[6] Lederer v. Rankin, 90 Fed. R. 449.

[7] Lederer v. Rankin, 90 Fed. R. 449, 450; In re Hohorst, 150 U. S. 653, 661; In re Keasbey & Mattison Co., 160 U. S. 221, 230; Van Patten v. Chicago, M. & St. P. Ry. Co., 74 Fed. R. 981.

[8] 29 St. at L., p. 695; Bowers v. Atlantic G. & P. Co. (S. D. N. Y., Coxe, J.), 104 Fed. R. 887.

[9] In re Keasbey & Mattison Co., 160 U. S. 221.

[10] McCormick H. M. Co. v. Walthers, 134 U. S. 41, 43; St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co., 33 Fed. R. 885, 886; In re Keasbey & Mattison Co., 160 U. S. 221.

in different States, the suit may be brought in the district in which either the plaintiff or the defendant resides, provided the defendant can be duly served.[11]

A corporation chartered by one of the United States cannot have a residence in another State,[12] even where it has, as a condition of doing business in the State, filed a stipulation authorizing service of process upon its agents within the State and agreeing not to remove a suit to the Federal court on the ground of difference of citizenship or non-residence.[13] In the absence of any provision in the charter, the principal office and the domicile of a railroad company incorporated by Congress is where the meetings of its stockholders and directors are held, and the records thereof with the registry of its stock are kept, and not where the general administrative offices of the heads of its departments are located.[14] When one of the plaintiffs was a resident of the district, and the other plaintiff and the defendant, who were citizens of different States, were non-residents, it was held that the court had no jurisdiction.[15] It has been held at Circuit that the non-resident defendant alone can object because the suit is not brought in the proper district.[16] The objection is usually waived by a general appearance without raising it,[17] even when neither party is a resident of the district.[18]

[11] McCormick H. M. Co. v. Walthers, 134 U. S. 41; Pitkin Min. Co. v. Markell, 33 Fed. R. 886; St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co., 33 Fed. R. 885, 886; Fales v. Chicago, M. & St. P. Ry. Co., 32 Fed. R. 673; Short v. Chicago, M. & St. P. Ry. Co., 33 Fed. R. 114; Gavin v. Vance, 33 Fed. R. 84; W. U. Tel. Co. v. Brown, 32 Fed. R. 337.

[12] Shaw v. Quincy Min. Co., 145 U. S. 444, 453; Galveston, H. & S. A. Ry. Co. v. Gonzales, 151 U. S. 496.

[13] Southern Pac. Co. v. Denton, 146 U. S. 202, 207.

[14] Interstate Com. Com. v. Texas & Pac. Ry. Co., 57 Fed. R. 948, 955; Texas & Pac. Ry. Co. v. Interstate Com. Com., 162 U. S. 197, 204.

[15] Smith v. Lyon, 133 U. S. 315; Elkhart Nat. Bank v. N. W. G. L. Co., 84 Fed. R. 76. It has been held that a Circuit Court has no jurisdiction, upon the ground of diverse citizenship, of a suit brought by residents of other districts than that for which the court sits, against several defendants, only one of whom is a resident of such district. Excelsior P. P. Co. v. Brown (C. C. A.), 74 Fed. R. 321.

[16] Jewett v. Bradford Sav. Bank & Tr. Co., 45 Fed. R. 801. But see Interior Const. & I. Co. v. Gibney, 160 U. S. 217, 220; Elkhart Nat. Bank v. N. W. G. L. Co., 84 Fed. R. 76; *infra*, § 101.

[17] St. Louis & S. F. Ry. Co. v. McBride, 141 U. S. 127; Texas & P. Ry. Co. v. Cox, 145 U. S. 593, 603; Interior Const. & I. Co. v. Gibney, 160 U. S. 217.

[18] Central Tr. Co. v. McGeorge, 151 U. S. 129.

It has been held that the rule requires the suit to be brought in the district in which the plaintiff or defendant resides and is a citizen; and does not authorize a suit in a State of which neither is a citizen.[19] "The word 'inhabitant' in that act was apparently used not in any larger meaning than 'citizen,' but to avoid the incongruity of speaking of a citizen of less than a State, when the intention was to cover not only a district which included a whole State, but also two districts in one State."[20] The word "inhabitant" seems, however, to be more limited than resident.[21] The Judiciary Act of 1887 does not require the bringing of the suit in the division of the district in which one of the parties resides.[22] An omission to allege the defendant's residence was held to be fatal upon a demurrer.[23] The limitation as to residence does not apply to the defendants who are served in pursuance of the Revised Statutes by publication or without the State or district,[24] even when they are the only defendants.[25]

This statute does not affect the jurisdiction in admiralty.[26] A special rule regulates proceedings under the Act to protect Trade and Commerce from unlawful Restraints and Monopolies.[27]

The Revised Statutes previously provided as follows: "When a State contains more than one district, every suit not of a local nature in the Circuit or District Courts thereof, against a single defendant, inhabitant of such State, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the State, it may be brought in either district, and a duplicate writ may be issued

[19] Bicycle Stepladder Co. v. Gordon, 57 Fed. R. 529; Shaw v. Quincy Min. Co., 145 U. S. 444, 447.

[20] Gray, J., in Shaw v. Quincy Min. Co., 145 U. S. 444, 447.

[21] For cases of residence, see King v. U. S., 59 Fed. R. 9; Rivers v. Bradley, 53 Fed. R. 805.

[22] Merchants' Nat. Bank v. Chattanooga Const. Co., 53 Fed. R. 814.

[23] Laskey v. Newtown Mining Co., 50 Fed. R. 634; *infra*, § 66.

[24] Greeley v. Lowe, 155 U. S. 58; Dick v. Foraker, 155 U. S. 404; Ames v. Holderbaum, 42 Fed. R. 841; U. S. v. Southern Pac. R. Co., 63 Fed. R. 481; Wheelright v. St. Louis, N. O. & O. Canal Co., 50 Fed. R. 709; *infra*, § 97. See Kuhn v. Morrison, 75 Fed. R. 81.

[25] Dick v. Foraker, 155 U. S. 404; Wheelright v. St. Louis, N. O. & O. Canal Co., 50 Fed. R. 709; U. S. v. Southern Pac. R. Co., 63 Fed. R. 481; Single v. Scott Paper Mfg. Co., 55 Fed. R. 553; Spencer v. Kansas City S. Y. Co., 56 Fed. R. 741.

[26] In re Louisville Underwriters, 134 U. S. 488.

[27] 26 St. at L. 209.

against the defendants, directed to the marshal of any other district in which any defendant resides. The clerk issuing the duplicate writ shall indorse thereon that it is a true copy of a writ sued out of the court of the proper district; and such original and duplicate writs, when executed and returned into the office from which they issue, shall constitute and be proceeded on as one suit; and upon any judgment or decree rendered therein, execution may be issued, directed to the marshal of any district in the same State."[28] "In suits of a local nature, where the defendant resides in a different district, in the same State, from that in which the suit is brought, the plaintiff may have original and final process against him, directed to the marshal of the district in which he resides."[29] "Any suit of a local nature, at law or in equity, where the land or other subject-matter of a fixed character lies partly in one district and partly in another, within the same State, may be brought in the Circuit or District Court of either district; and the court in which it is brought shall have jurisdiction to hear and decide it, and to cause mesne or final process to be issued and executed, as fully as if the said subject-matter were wholly within the district for which such court is constituted."[30]

It has been held that these sections have not been repealed.[31]

The statutes which divide certain judicial districts into divisions usually provide that all suits, not of a local nature, against a single defendant, or when all the defendants reside in the same division of the district, shall be brought in the division in which the defendant or defendants reside; but that if there are two or more defendants residing in different divisions, the suit may be brought in either division; and further, that where cases are removed from the State courts, such removal shall be to the United States Circuit Courts in the division in which the county is situated from which the removal is made; and that prosecutions for crimes or offenses committed in either of the divisions shall be cognizable within such divisions.[32]

[28] U. S. R. S., § 740.

[29] U. S. R. S., § 741.

[30] U. S. R. S., § 742.

[31] East Tennessee, V. & G. R. Co. v. Atlanta & T. R. Co., 49 Fed. R. 608, 616; Goddard v. Mailler, 80 Fed. R. 422. See Greeley v. Lowe, 155 U. S. 58, 72. *Contra*, Lacombe, J., in N. J. Steel & I. Co. v. Chormann, 105 Fed. R. 582.

[32] *Alabama:* 23 St. at L. 18, 19. *Georgia:* 21 St. at L. 62, 63; 25 St. at L. 671, which provides that "when the defendant is a non-resident of

It has been held that a suit in a Circuit Court of the United States in Iowa, against a defendant who is a resident of another State, need not be brought in the division of the district where the plaintiff resides.[33]

It has been held of the statute dividing the district of Washington that the exception of suits "of a local character" directs by implication that such a suit must be brought in the district where the thing or property proceeded against happens to be situated; and that a libel in admiralty is a suit of a local nature, which consequently must be prosecuted in the division where the vessel is seized, although her home port is in another division.[34]

The act dividing the district of Montana into two divisions omits the customary clause as to the criminal jurisdiction of the same, and consequently an indictment can be found in either for a crime committed in the other division.[35] This provides as to the southern division that "where one or more defendants in any civil cause shall reside in said division, and one or more defendants in such cause shall reside out of said division but in said district, then the plaintiff may institute his action either in the court having jurisdiction of the latter or in the said division."[36] The section of the Revised Statutes which divides the district of South Carolina into "Eastern and Western Districts" makes geographical divisions of the same, not separate judicial districts; and indictments may be found and trials held in either for offenses committed anywhere in the State.[37]

either division, an action may, if plaintiff is a citizen of the district, be brought in that division where the defendant may be found." *Idaho:* 30 St. at L. 423. *Iowa:* U. S. R. S., § 744, 21 St. at L. 155. *Kansas:* 26 St. at L. 129; 27 St. at L. 24. *Kentucky:* U. S. R. S., § 745, 25 St. at L. 390. *Louisiana:* 25 St. at L. 388, 438. *Michigan:* 20 St. at L. 175; 28 St. at L. 67, which provides that "actions *in rem* in admiralty may be brought in whatever division of the district service can be had upon the *res*." *Minnesota:* 26 St. at L. 72; 28 St. at L. 102. See Post v. U. S., 161 U. S. 583. *Missouri:* 20 St. at L. 263; 24 St. at L. 424. *North Dakota:* 26 St. at L. 67. *Ohio:* 21 St. at L. 63. *South Dakota:* 26 St. at L. 14; 28 St. at L. 5. *Tennessee:* 20 St. at L. 206; 21 St. at L. 751. *Utah:* 29 St. at L. 620. *Washington,* 26 St. at L. 45. But see as to *Arkansas,* 29 St. at L. 590.

[33] Dinzy v. Illinois Cent. R. Co., 61 Fed. R. 49.

[34] The Williamette, 58 Fed. R. 602.

[35] 27 St. at L. 252; Rosencrans v. U. S., 165 U. S. 257.

[36] Ibid.

[37] Barrett v. U. S., 169 U. S. 218; s. c., 169 U. S. 231.

The Revised Statutes further direct that "the trial of offenses punishable with death shall be had in the county where the offense was committed, where it can be done without great inconvenience."[38] The fact that a suit relates to land within the district does not give the Circuit Court jurisdiction where there is no Federal question nor difference of citizenship.[39] Where a suit is brought in a Circuit Court to recover land in another district together with the rent of the same, the court has jurisdiction to award judgment for the value of the rents.[40]

§ 23. Special limitation upon jurisdiction of the Circuit Court for Southern District of New York.— The Revised Statutes provide that "the original jurisdiction of the Circuit Court for the Southern District of New York shall not be construed to extend to causes of action arising within the Northern District of said State."[1] This does not exclude from the jurisdiction of the court causes of action that arise without the State.[2] It has been held that this forbids the issue by that court of an injunction to prevent the infringement of a patent when the sole previous cases of infringement occurred in the northern district of New York.[3] The effect of a recent statute upon this limitation has not been decided.[4]

§ 24. Suits by assignees.— The statutes further limit the jurisdiction of the courts of the United States by providing that no Circuit or District Court shall "have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made."[1]

The words "if such instrument be payable to bearer and be not made by any corporation" do not limit the comprehensive-

[38] U. S. R. S., § 729.

[39] Pooley v. Luco, 73 Fed. R. 561.

[40] Healey v. Humphrey (C. C. A.), 81 Fed. R. 990.

§ 23. [1] U. S. R. S., § 637.

[2] Wheeler v. McCormick, 8 Blatchf. 268.

[3] Black v. Thorne, 10 Blatchf. 66. See Consolidated Fastener Co. v. Columbian F. Co., 73 Fed. R. 828. As to the Eastern District, see National Button Works v. Wade, 72 Fed. R. 298.

[4] 29 St. at L., p. 695; *supra*, § 22.

§ 24. [1] Act of March 3, 1887, § 1, 24 St. at L. 552.

ners of the phrase "chose in action."[2] The effect of this clause is to deprive the Circuit Courts of all jurisdiction for the recovery of promissory notes or other choses in action, except (1) suits upon foreign bills of exchange; (2) suits which might have been brought there had no assignment or transfer been made; and (3) suits upon choses in action made by corporations and payable to bearer.[3] A draft drawn in one State and payable in another of the United States is a foreign bill of exchange.[4]

A check is a bill of exchange.[5] A promissory note payable "to the order of ——" is equivalent to a promissory note payable to bearer.[6] A bill of exchange or promissory note drawn to the order of the bearer and by him indorsed in blank is payable to bearer within the meaning of the statute.[7] A county warrant payable to a specified person or bearer is equivalent to one payable to bearer.[8] A city,[9] county,[10] incorporated town,[11] or township,[12] is held to be a corporation, and the holder of their bonds, warrants or other written obligations payable to bearer can sue in a Federal court in a proper case irrespective of the citizenship of any previous holder. The assignee of a city warrant not payable to bearer cannot sue in a Federal court which would have had no jurisdiction of a suit by his assignor.[13] "The terms used, 'the contents of any promissory

[2] Mexican Nat. R. Co. v. Davison, 157 U. S. 201, 206, 207.

[3] Newgass v. New Orleans, 33 Fed. R. 196; New Orleans v. Quinlan, 173 U. S. 191.

[4] Buckner v. Finley, 2 Pet. 586, 593.

[5] Bull v. Bank of Kasson, 123 U. S. 105.

[6] Steel v. Rathburn, 42 Fed. R. 390; Lyon County v. Keene F. C. Sav. Bank (C. C. A.), 100 Fed. R. 337.

[7] Bank of British N. A. v. Barling, 46 Fed. R. 357; s. c. in C. C. A., 56 Fed. R. 260; Jones v. Shapero, 57 Fed. R. 457. A promissory note payable to the order of a specified person and indorsed by him in blank is not a promissory note payable to bearer within the statutory exception. Thomson v. Town of Elton, 100 Fed. R. 145. The fact that a note payable to bearer and secured by a mortgage is overdue when it is assigned does not deprive the assignee of his right to seek the Federal jurisdiction. Cross v. Allen, 141 U. S. 528.

[8] Thompson v. Searcy County (C. C. A.), 57 Fed. R. 1030; Jerome v. Rio Grande Co. Com'rs, 18 Fed. R. 873. So is a county drain order. Gratiot County v. Aylesworth, 159 U. S. 250.

[9] New Orleans v. Quinlan, 173 U. S. 191.

[10] Leake Co. Com'rs v. Dudley, 173 U. S. 243; Rollins v. Chaffee County, 34 Fed. R. 91; Wilson v. Knox County, 43 Fed. R. 481.

[11] A New York town, Andes v. Ely, 158 U. S. 312.

[12] An Ohio township, Loeb v. Trustees of Columbia Tp., 91 Fed. R. 87.

[13] Cloud v. City of Sumas, 52 Fed. R. 177; New Orleans v. Benjamin, 153 U. S. 411. The acceptance by a

note or other chose in action,' were designed to embrace the rights the instrument conferred which were capable of enforcement by suit. They were not happily chosen to convey this meaning; but they have received a construction substantially to that purport in repeated decisions." [14]

The phrase "suit to recover the contents of a chose in action" includes suits to recover debts, or any claims for damages for breach of contract, or for torts connected with contract.[15] The phrase also includes suits to foreclose mortgages,[16] and to enforce the specific performance of contracts for the delivery of real or personal property,[17] and to recover upon a contract of insurance with a reformation of the policy.[18] The phrase does not include a suit of replevin [19] or ejectment,[20] or otherwise brought to recover property taken by the defendant before the assignment of the title to the plaintiff; [21] nor a suit to recover damages for the conversion of personal property; [22] nor a suit in equity to compel the transfer of stock on the books of a corporation; [23] nor, it has been held, a suit by the

city of an order by a contractor directing the payment to a third person of part of the contract price was held to constitute a new contract between the city and the payee, and not to be the assignment of the original contract. City of Superior v. Ripley, 138 U. S. 93.

[14] Shoecraft v. Bloxham, 124 U. S. 730, 735; affirmed in Plant Inv. Co. v. Jacksonville, T. & K. W. Ry. Co., 152 U. S. 71, 76.

[15] Bushnell v. Kennedy, 9 Wall. 387; 390; Sere v. Pitot, 6 Cranch, 332, 335, 336; Sheldon v. Gill, 8 How. 441, 449, 450; Tredway v. Sanger, 107 U. S. 323, 325; Mersman v. Werges, 112 U. S. 139, 143; Corbin v. County of Black Hawk, 105 U. S. 659, 665, 666. But not a suit by the assignee of a note to recover damages against a public officer for the illegal execution of the same. Indiana v. Glover, 155 U. S. 513.

[16] The holder of a promissory note payable to bearer, which is secured by a mortgage, may foreclose in a Federal court in a case where the original holder could not. Tredway v. Sanger, 107 U. S. 323; Cross v. Allen, 141 U. S. 528. Not, however, where the note is void and the mortgage valid. Mersman v. Werges, 112 U. S. 139.

[17] Corbin v. County of Black Hawk, 105 U. S. 659, 665; Shoecraft v. Bloxham, 124 U. S. 730; Plant Inv. Co. v. Jacksonville, T. & K. W. Ry. Co., 152 U. S. 71, 76; Jackson & S. Co. v. Pearson, 60 Fed. R. 118.

[18] Laird v. Indemnity Mut. M. Co., 44 Fed. R. 712.

[19] Deshler v. Dodge, 16 How. 622, 631.

[20] Smith v. Kernochen, 7 How. 198.

[21] Gest v. Packwood, 39 Fed. R. 525.

[22] Ambler v. Eppinger, 137 U. S. 480. Nor a claim against a railroad company to recover excessive overcharges for freight. Conn v. Chicago, B. & Q. R. Co., 48 Fed. R. 177.

[23] Jewett v. Bradford S. B. Tr. Co., 45 Fed. R. 801.

assignee of a corporate debt to enforce the individual liability of a stockholder;[24] nor a suit by the assignee of a claim against a decedent to set aside a decree for fraud and to compel the payment of the claim;[25] nor a suit founded upon a judgment which seeks other relief than the payment of the same, although the suit in which the judgment was recovered could not have been brought in a Federal court.[26] But it seems that a suit to collect a judgment cannot be brought by an assignee in a Federal court unless his assignor might have sued there;[27] and the holder of a municipal warrant who seeks to recover municipal assets without a previous judgment at law is within the meaning of the phrase.[28]

It has been suggested that the restriction applies only to contracts "which may be properly said to have contents," not to "mere naked rights of action founded on some wrongful act,"— some neglect of duty to which the law attaches damages, such as failure to protest a note; but to "rights of action founded on contracts which contain within themselves some promise or duty to be performed."[29] It has been held that an indorsee who is a citizen of the same State as the maker of the note may sue his immediate indorser in a Federal court, if that indorser be a citizen of a different State;[30] but that when, in a suit against a remote indorser, the plaintiff derives his title through a citizen of the same State as the defendant, there is no jurisdiction on account of the difference of citizenship between the latter and the plaintiff;[31] that the person who has advanced money upon an accommodation note can sue the

[24] Ballard v. Bell, 1 Mason, 243.

[25] Bertha Z. & M. Co. v. Vaughn, 88 Fed. R. 566.

[26] Bean v. Smith, 2 Mason, 252, 269; Ober v. Gallagher, 93 U. S. 199, 206; Mississippi Mills v. Cohn, 150 U. S. 202. But see Metcalf v. Watertown, 128 U. S. 586. Nor a suit to vacate the satisfaction of a judgment. Hay v. Alexandria & W. R. Co., 20 Fed. R. 15. But see Blacklock v. Small, 127 U. S. 96.

[27] Metcalf v. Watertown, 128 U. S. 586; First Nat. Bank v. Dull County, 74 Fed. R. 373.

[28] New Orleans v. Benjamin, 153 U. S. 411.

[29] Barney v. Globe Bank, 5 Blatch. 107. See, however, Bushnell v. Kennedy, 9 Wall. 387, 391; Ambler v. Eppinger, 137 U. S. 480, 483.

[30] Young v. Bryan, 6 Wheat. 146; Manufacturing Co. v. Bradley, 105 U. S. 175; Parker v. Ormsby, 141 U. S. 81.

[31] Turner v. Bank of N. A., 4 Dall. 8; Mollan v. Torrance, 9 Wheat. 537, 538. But see Portage C. R. Co. v. Portage, 102 Fed. R. 769.

maker, if a citizen of a different State, in a Federal court, although the indorser is a citizen of the same State;[32] and that under similar circumstances the payee of a bill of exchange can sue the acceptor although he could not have sued the drawer in the Federal court.[33] Assignees in insolvency[34] are included within this restriction; but receivers[35] and executors and administrators[36] are not. A party who claims the benefit of a contract as an incident to another contract is to be considered as the assignee of the former when he sues to enforce it, although it has never been formally assigned to him.[37] A party who claims by subrogation is not within this restriction.[38] It has been held that the restriction does not apply when the only reason why the assignor could not have sued was that his claim was less in value than the jurisdictional amount.[39] The assignee must aver in his pleading that his assignor might have sued in the Federal court.[40] An allegation in a bill filed by an assignee of claims against a Louisiana corporation, that the assignors are and were citizens of States other than Louisiana, and competent as such to sue the defendant, in the Circuit Court, if no assignment has been made, was held to be insufficient to confer jurisdiction on the Circuit Court because the State or States of which the assignors were citizens were not specifically designated.[41] Where at the time of the commencement of the suit the assignor might have sued in the Federal court, but at the time of the assignment he could not, it was

[32] Goldsmith v. Holmes, 86 Fed. R. 484; s. c., Holmes v. Goldsmith, 147 U. S. 150; Wachusett Nat. Bank v. Sioux C. S. Works, 56 Fed. R. 321.

[33] Superior v. Ripley, 138 U. S. 93.

[34] Sere v. Pitot, 6 Cranch, 332, 336. So are buyers at a judicial sale. Glass v. Concordia P. Police Jury, 176 U. S. 207.

[35] Davies v. Lathrop, 12 Fed. R. 353. But see U. S. Nat. Bank v. McNair, 56 Fed. R. 323; Thompson v. Pool, 70 Fed. R. 725.

[36] Sere v. Pitot, 6 Cranch, 332, 336; Chappedelaine v. Dechenaux, 4 Cranch, 306; Childress v. Emory, 8 Wheat. 642.

[37] Plant Inv. Co. v. Jacksonville, T. & K. W. Ry. Co., 152 U. S. 71, 76. But see Portage C. W. Co. v. Portage, 102 Fed. R. 769.

[38] New Orleans v. Caines' Adm'r, 138 U. S. 595, 606.

[39] Bernheim v. Birnbaum, 80 Fed. R. 885, 887; Bowden v. Burnham (C. C. A.), 59 Fed. R. 752; Bergman v. Inman, 91 Fed. R. 293; Chase v. Sheldon R. M. Co., 56 Fed. R. 625. See also Hammond v. Cleaveland, 23 Fed. R. 1.

[40] Parker v. Ormsby, 141 U. S. 81; U. S. Nat. Bank v. McNair, 56 Fed. R. 323.

[41] Benjamin v. New Orleans (C. C. A.), 74 Fed. R. 417.

held that there was jurisdiction.[42] The statute does not forbid one of the original contractors from suing in a Federal court the assignee of the other party, although the citizenship of the plaintiff is the same as that of the assignor.[43]

§ 25. Jurisdiction of the District Courts of the United States.— The jurisdiction of the District Courts of the United States in civil causes extends to suits for penalties and forfeitures incurred under any law of the United States, including the contract labor law;[1] suits at common law brought by the United States or any officer thereof authorized by law to sue, including a receiver of a national banking association appointed by the comptroller;[2] suits in equity to enforce the lien of the United States upon any real estate for any internal revenue tax, or to subject to the payment of any such tax any real estate owned by the delinquent, or in which he has any right, title, or interest; suits for the recovery of any forfeiture or damages under section 3490 of the Revised Statutes; causes of action arising under the postal laws of the United States; civil causes of admiralty[3] and maritime jurisdiction, and all seizures on land and water not within admiralty and maritime jurisdiction; prizes on land and water; suits brought by the assignees of debentures for drawback of duties to enforce such debentures; all suits under the civil rights laws, including a suit by colored children alleging that, under the State statutes, they were denied the equal protection of the laws by their exclusion from certain public schools;[4] proceedings by *quo warranto*,

[42] Jones v. Shapero (C. C. A.), 57 Fed. R. 457.

[43] Brooks v. Laurent (C. C. A.), 98 Fed. R. 647.

§ 25. [1] U. S. v. Whitcomb M. B. Co., 45 Fed. R. 89.

[2] Stephens v. Bernays, 44 Fed. R. 642. An action by the United States in the name of a State upon a sheriff's bond for an escape was allowed in a District Court. Tennessee v. Hill, 60 Fed. R. 1005.

[3] This includes jurisdiction over a suit against a vessel within the jurisdiction to recover for a tort committed upon the high seas, although the vessel, the libelant and the tortfeasor are aliens. The Noddleburn, 28 Fed. R. 855; s. c., 30 Fed. R. 142. A District Court may, however, in its discretion refuse to entertain suit by foreign seamen against a foreign ship for wages when the result would be a detention of the vessel and the sailors' employment has not terminated. Slocum v. Western Assur. Co., 42 Fed. R. 235. A District Court, however, entertained jurisdiction of a suit by an American citizen, who did not reside within the district, to recover upon a marine policy of insurance executed in a foreign country by a foreign corporation. Ibid.

[4] Davenport v. Cloverport, 72 Fed. R. 689.

prosecuted by a district attorney of the United States, for the removal from office of a person disqualified by the Fourteenth Amendment to the Constitution; suits by aliens for torts "only" in violation of the law of nations or of a treaty of the United States; suits against consuls or vice-consuls;[5] and all matters and proceedings in bankruptcy.[6] They have also jurisdiction over prosecutions for all crimes against the United States not capital committed within their respective districts or upon the high seas, except for depositing fraudulent papers in the archives of the office of the Surveyor General in California, and as limited by special statutes.[7]

A District Court can, by the defendant's consent, but not otherwise, entertain jurisdiction over a suit brought by trustees in bankruptcy to set aside fraudulent transfers of money or property made by the bankrupt to third parties before the institution of the proceedings in bankruptcy;[8] or suits of replevin to recover personal property similarly fraudulently conveyed.[9] The District Courts also have jurisdiction of suits against the United States to collect claims not exceeding $1,000; for money only, founded upon the Constitution of the United States; or such suits founded upon any law of Congress, except for pensions; or upon any contract, expressed or implied, with the government of the United States, except to recover fees, salary or compensation for official services; and of suits for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the plaintiff would be entitled to redress against the United States in a court of law, equity or admiralty, if the United States were suable, except war claims which, before March 3, 1887, were rejected or reported on adversely by any court, department or commission authorized to hear and determine the same;[10] and proceedings to condemn for national public purposes land situated within their respective districts.[11] It has been held that a District Court may punish as a contempt the unlawful ouster of the court, its officers and records from the rooms of a pub-

[5] U. S. R. S., § 563. See U. S. v. Mooney, 116 U. S. 104.

[6] U. S. R. S., § 563; 30 St. at L. 545, 546, 552.

[7] U. S. R. S., §§ 563, 5412.

[8] Bardes v. Hawarden Bank, 178 U. S. 524, 539; Hicks v. Knost, 178 U. S. 541.

[9] Mitchell v. McClure, 178 U. S. 539. *Cf.* White v. Schloerb, 178 U. S. 542.

[10] 24 St. at L. 505; 30 St. at L. 494. See U. S. v. Jones, 131 U. S. 1; *infra*, § 36.

[11] 25 St. at L. 357. See *infra*, § 381.

lic building where they are located, and as incidental to the contempt proceeding it may issue a stay order against such a removal.[12]

§ 26. Territorial jurisdiction and terms of the Supreme Court and Circuit Courts of Appeal of the United States.— The Supreme Court has jurisdiction throughout the United States. It holds one term annually at Washington, commencing on the second Monday of October.[1] It may also hold adjourned and special terms.[2] In case of a contagious or epidemic disease, a term may be held at another place.[3]

The territorial jurisdiction of the Circuit Courts of Appeals is as follows: The first circuit includes the districts of Rhode Island, Massachusetts, New Hampshire, and Maine.[4] The second circuit includes the districts of Vermont, Connecticut, and New York.[5] The third circuit includes the districts of Pennsylvania, New Jersey, and Delaware.[6] The fourth circuit includes the districts of Maryland, Virginia, West Virginia, North Carolina, and South Carolina.[7] The fifth circuit includes the districts of Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas.[8] The sixth circuit includes the districts of Ohio, Michigan, Kentucky, and Tennessee.[9] The seventh circuit includes the districts of Indiana, Illinois, and Wisconsin.[10] The eighth circuit includes the districts of Colorado, Arkansas, Iowa, Kansas, Minnesota, Missouri, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, Wyoming.[11] The jurisdiction of the Circuit Court of Appeals for the eighth judicial circuit is also extended to writs of error to, and appeals from, the final decisions of the Appellate Court of the Indian Territory, in the same manner and under the same regulations as appeals are taken from the Circuit Courts of the United States, except in citizenship cases, when appeals are taken immediately to the Supreme Court of the United States.[12] The ninth circuit includes the districts of Alaska, Arizona,

[12] In re Lyman, 55 Fed. R. 29, 43.

§ 26. [1] U. S. R. S., § 684.
[2] U. S. R. S., §§ 684–686.
[3] U. S. R. S., § 4799.
[4] U. S. R. S., § 604.
[5] U. S. R. S., § 604.
[6] U. S. R. S., § 604.
[7] U. S. R. S., § 604.
[8] U. S. R. S., § 604.
[9] U. S. R. S., § 604.
[10] U. S. R. S., § 604.
[11] U. S. R. S., § 604; 19 St. at L. 61; 25 St. at L. 676; 139 U. S. 707; 26 St. at L. 215, 826, 880; 28 St. at L. 107.
[12] 28 St. at L. 698; 30 St. at L. 591. See Brown v. U. S., 171 U. S. 631.

California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.[13]

The term of the Circuit Court of Appeals for the first circuit is held in the city of Boston on the first Tuesday of October. The term of the Circuit Court of Appeals for the second circuit is held in the city of New York on the last Tuesday of October. The term of the Circuit Court of Appeals for the third circuit is held in Philadelphia on the first Tuesday of March and the third Tuesday of September. The terms of the Circuit Court of Appeals for the fourth circuit are held in Richmond on the first Tuesdays of February, May and November. The term of the Circuit Court of Appeals for the fifth circuit is held in New Orleans on the third Monday of November. The term of the Circuit Court of Appeals for the sixth circuit is held in Cincinnati on the Tuesday after the first Monday of October. The term of the Circuit Court of Appeals for the seventh circuit is held in Chicago on the first Tuesday of October. The terms of the Circuit Court of Appeals for the eighth circuit are held at St. Paul, Minnesota, on the first Monday of May, and at St. Louis, Missouri, on the first Monday of December. The term of the Circuit Court of Appeals for the ninth circuit is held at San Francisco on the first Monday of October.[14] The terms of the United States Circuit Courts of Appeal may be also held at such times and places as the courts may designate.[15]

§ 26a. Territorial jurisdiction and terms of the Circuit and District Courts of the United States.—There is a Circuit Court in each judicial district of the United States.[1] A Circuit Court cannot serve process, except in some cases a subpœna, beyond its district.[2]

It has been said that when one term begins, the preceding term, at least when held in the same place, ends, unless it was the evident intention of the statutes that the two terms should be concurrent in whole or in part.[3] The term does not expire

[13] U. S. R. S., § 604; 25 St. at L. 676; 26 St. at L. 830; 139 U. S. 707; 26 St. at L. 217; St. 1900, 158.

[14] 26 St. at L. 826; Amended Rules of C. C. A., 90 Fed. R. lii-lxi, lxxiii, lxxix, lxxxix, lxxxviii, cxi, cxxiii, cxxxiv; 91 Fed. R. iii.

[15] 26 St. at L. 826.

§ 26a. [1] U. S. R. S., § 608; 18 St. at L. 195; 25 St. at L. 655; 25 St. at L., ch. 180, p. 682.

[2] Toland v. Sprague, 12 Pet. 300, 328.

[3] Ex parte Friday, 43 Fed. R. 916, 918. It has been held that the term of a Circuit Court does not necessarily end at the opening of a term

until the limit set by law for its continuance,[4] unless, perhaps, when it has been formally adjourned without a day.

There is a District Court in each judicial district of the United States.

The judicial districts and the terms of the Circuit and District Courts held therein are as follows: —

In *Alabama*, three districts,— the Southern, Middle, and Northern. The Southern District of Alabama includes the counties of Mobile, Washington, Baldwin, Clarke, Marengo, Wilcox, Monroe, Choctaw, Escambia, and Conecuh. The terms for this district of both the Circuit and District Courts are held at the city of Mobile on the fourth Monday of November and the first Monday in May. A Circuit and a District Court for the Middle District of Alabama are held at the city of Montgomery. This includes the counties of Montgomery, Autauga, Coosa, Tallapoosa, Chambers, Randolph, Macon, Russell, Barbour, Pike, Henry, Dale, Coffee, Covington, Lowndes, Dallas, Perry, Butler, Bullock, Chilton, Crenshaw, Elmore, Geneva, and Lee. The terms of the Circuit and District Courts for this district are held at the city of Montgomery on the first Mondays of May and November. There is a Circuit and a District Court for the Northern District, which includes the remainder of the State. This district is divided into two divisions. The Southern Division of the Northern District contains the counties of Sumter, Greene, Hale, Pickens, Tuscaloosa, Lamar, Fayette, Walker, Jefferson, Blount, Bibb, Shelby, Saint Clair, Etowah, Calhoun, Cleburne, Clay, Talladega, Cherokee, and De Kalb, in which the court is held at Birmingham. In this division of the Northern District, terms of both Circuit and District Courts are held at the city of Birmingham on the first Mondays of March and September. The Northern Division of the Northern District includes the remaining counties in it, and both the Circuit and District Courts are held in this division at the city of Huntsville on the first Monday of April and the second Monday of October.[5]

held at another place in the same district (East Tennessee Iron & Coal Co. v. Wiggin (C. C. A.), 68 Fed. R. 446); and that a term of a Circuit Court may be adjourned to a distant day and its sessions then resumed as a part of the same term, although another term has been held at another place during the adjourned term. State of Florida v. Charlotte Harbor Phosphate Co. (C. C. A.), 70 Fed. R. 883.

[4] Schofield v. Horse Springs Cattle Co., 65 Fed. R. 433.

[5] U. S. R. S., §§ 532, 608; 18 St. at L. 195; 23 St. at L. 18; 26 St. at L. 180.

Alaska: In Alaska there is a District Court with general jurisdiction in civil, criminal, equity and admiralty cases. The court consists of three divisions, each of which is held by a different judge with separate clerk, district attorney and marshal. The jurisdiction of each division extends over the entire territory; but the court, where an action is pending, may change the place of trial from one place to another in the same or another division for local prejudice, for the convenience of witnesses, disqualification of the division judge or the convenience of the defendant, and in criminal prosecutions also to save expense to the United States, where the defendant will not be prejudiced thereby.

In Division One at least four terms of court are annually held, two at Juneau and two at Skaguay, at times designated by the judge in January. In Division Two at least one term a year is held at Saint Michaels, beginning on the third Monday in June. In Division Three at least one term a year is held at Eagle City, beginning on the first Monday of June. Special terms may also be held upon thirty days' notice of the time and place. For recording purposes, the district judges are directed to divide the district into three recording divisions and to define the boundaries of the same.[6]

In *Arkansas*, two districts,— the Eastern and Western. The Western District of Arkansas includes the counties of Benton, Washington, Carroll, Boone, Madison, Newton, Crawford, Franklin, Johnson, Logan, Sebastian, Scott, Yell, Polk, Sevier, Howard, Pike, Little River, Hempstead, Miller, Lafayette, Nevada, Columbia, Union, Ouachita and Calhoun. The Western District is divided into two divisions known as the Texarkana and Fort Smith divisions. The Texarkana Division includes the counties of Sevier, Howard, Pike, Little River, Hempstead, Miller, Lafayette, Columbia, Nevada, Ouachita, Calhoun and Union. The remaining counties of the Western District compose the Fort Smith Division. Terms of the District and Circuit Courts for the Western District are held each year at the city of Texarkana, in the county of Miller, on the second Mondays in May and November, and at the city of Fort Smith, in the county of Sebastian, on the second Mondays in January

[6] 31 St. at L. 322–326. See Ex parte Cooper, 143 U. S. 472; Steamer Coquitlam v. U. S., 163 U. S. 346; Decker v. Williams, 73 Fed. R. 308.

and June. The Eastern District includes the residue of the State, and is divided into two divisions,—the Northern and Western. The Eastern Division consists of the counties of Mississippi, Crittenden, Lee, Phillips, Clay, Craighead, Poinsett, Greene, Cross, Saint Francis, and Monroe. The Northern Division includes the counties of Independence, Cleburne, Stone, Izard, Baxter, Searcy, Marion, Sharp, Fulton, Randolph, Lawrence and Jackson. The remaining counties of the Eastern District constitute the Western Division.

Terms of the District and Circuit Courts for the Eastern District are held at the city of Batesville, in the county of Independence, commencing on the fourth Monday of May and the second Monday of December; at the city of Helena, in the county of Phillips, on the second Mondays in March and October; at the city of Little Rock, in the county of Pulaski, terms of the District Court are held on the first Monday in April and the third Monday in October.[7]

In *California*, two districts,—the Northern and the Southern. The Southern District is divided into two divisions. The Northern Division consists of the counties of Inyo, Mariposa-Tulare, Merced, Madera, Fresno, Kings and Kern. The South, ern Division consists of the counties of Los Angeles, Orange, Riverside, San Bernardino, San Diego, San Luis Obispo, Santa Barbara and Ventura. The remainder of California is comprised in the Northern District.

Terms of both Circuit and District Courts for the Northern Division of the Southern District are held at Fresno on the first Monday of May and the second Monday of November. Terms of both courts for the Southern Division of the Southern District at Los Angeles on the second Mondays of January and July. In the Northern District, terms of both Circuit and District Courts are held at San Francisco on the first Monday in March, the second Monday in July, and the first Monday in November. Prior to the division of the original district of California,

[7] U. S. R. S., §§ 608, 533, 572; 18 St. at L. 230; 19 St. at L. 230; 24 St. at L. 83, 45; 25 St. at L. 655; 27 St. at L. 3; 29 St. at L. 591; 30 St. at L. 976; 31 St. at L. 733. For the special jurisdiction of courts held in the western district over controversies affecting the Gulf, Colorado & Santa Fé Railroad Company, and the Southern Kansas Railway Company, see 23 St. at L. 8, 72; 23 St. at L. 75; Briscoe v. Southern Kan. Ry. Co., 40 Fed. R. 273; s. c., 144 U. S. 133. As to Indian Territory, see 25 St. at L. 786; Gowen v. Harley, 56 Fed. R. 978.

provision was made for holding special sessions of the Circuit Court.[8]

Colorado constitutes one judicial district. Terms of Circuit and District Courts for this district are held at Denver on the first Tuesdays in May and November, at Pueblo on the first Tuesday in April, and at Del Norte on the first Tuesday in August.[9]

Connecticut constitutes one judicial district. District Courts are held at New Haven on the Fourth Tuesday in February, at Hartford on the fourth Tuesday in May, at New Haven on the fourth Tuesday in August, and at Hartford on the first Tuesday of December. A Circuit Court for this district is held at New Haven on the fourth Tuesday in April, and at Hartford on the second Tuesday in October.[10]

Delaware constitutes one judicial district. The District Court is held at Wilmington on the second Tuesdays in January, April, June, and September. The Circuit Court is held at Wilmington on the third Tuesdays in June and October.[11]

In *Florida*, two districts,— the Northern and Southern. The Southern District embraces the counties of Hernando, Hillsborough, Polk, Manatee, Monroe, Alabama, Baker, Bradford, Brevard, Clay, Columbia, Dade, Duval, Hamilton, Lake, Madison, Marion, Nassau, Orange, Osceola, Putnam, Saint John, Sumter, Suwannee and Volusia. The rest of the State constitutes the Northern District. In the Southern District, Circuit and District Courts are held at Tampa on the second Monday in February, at Key West on the first Mondays of May and November, at Jacksonville on the first Monday in December, and at Ocala on the third Monday of February. In the Northern District, both the District and Circuit Courts are held at Tallahasse on the first Monday in February, at Pensacola on the first Monday in March.[12]

In *Georgia*, two districts,— the Northern and Southern. The Northern District of Georgia originally included the counties of Troup, Meriwether, Pike, Butts, Jasper, Morgan, Green, Taliaferro, Wilkes, and Lincoln as they existed August 11, 1848,

[8] U. S. R. S., § 664; 24 St. at L. 308-310; 29 St. at L. 135; 31 St. at L. 219.

[9] 19 St. at L. 61; 24 St. at L. 214.

[10] U. S. R. S., §§ 531, 572; 21 St. at L. 41; 29 St. at L. 317.

[11] U. S. R. S., §§ 531, 572, 658.

[12] U. S. R. S., §§ 534, 572, 658; 20 St. at L. 280; 24 St. at L. 106; 28 St. at L. 117, 149; 31 St. at L. 73, 818.

with all the counties north of them. Pike, Butts, Jasper, Lincoln, Wilkes, and Taliaferro have since been annexed to the Southern District. The Eastern, Western and Northwestern Divisions of the Northern District have recently been constituted. The Eastern Division consists of the counties of Banks, Clarke, Franklin, Greene, Habersham, Hart, Jackson, Morgan, Madison, Oglethorpe, Ownee, Walton, Rabun, White, and Elbert. The Northwestern Division consists of the counties of Dade, Walker, Catoosa, Whitfield, Murray, Chattooga, Gordon, Floyd, Bartow, Polk, Paulding, Haralson, and Carroll. The Western Division consists of the counties of Muscogee, Heard, Troup, Meriwether, Harris, Talbot, Taylor, Marion, Chattahoochee, Stewart, Schley, Webster, Quitman, Clay, Randolph, Early, Miller, and Terrell. The Southern District is divided into Eastern, Northeastern, and Western Divisions. The Western Division consists of the following counties: Bibb, Monroe, Jones, Twiggs, Houston, Crawford, Baldwin, Wilkinson, Laurence, Pulaski, Dooly, Macon, Upson, Pike, Butts, Jasper, Putnam, Hancock, Warren, Dodge, Wilcox, Telfair, Sumter, Lee, Calhoun, Dougherty, Baker, and Mitchell. The Eastern Division consists of the remaining counties of the district. The counties of Warren, Glascock, McDuffie, Columbia, Richmond, Burke, Jefferson, Johnson, Washington, Lincoln, Wilkes, and Taliaferro compose the Northeastern Division. In the Northern District terms of both courts are held at Atlanta on the second Monday in March and on the first Monday in October; at Athens on the third Monday in April and the first Monday in October; at Columbus, Muscogee county, on the first Mondays of May and December, and at Rome on the third Mondays of May and November, to continue as long as the presiding judge deems necessary. In the Southern District terms of the District Court are held at Savannah on the second Tuesdays in February, May, August, and November, and of the Circuit Court on the second Monday of April and the Thursday after the first Monday in November; at Macon, of both courts on the first Mondays of May and October, and at Augusta of both courts on the first Monday of April and the third Monday of November.[13]

[13] U. S. R. S., §§ 535, 572, 658; 21 St. 671, 690; 26 St. at L. 1110; 28 St. at at L. 62; 23 St. at L. 50; 25 St. at L. L. 504; 31 St. at L. 78.

Hawaii: In the Territory of Hawaii there is a District Court which has, in addition to the ordinary jurisdiction of a District Court, jurisdiction of all cases cognizable in a Circuit Court of the United States, and it proceeds in the same manner as a Circuit Court. Writs of error thereto and appeals therefrom are had and allowed to the Circuit Courts of Appeals in the Ninth District in the same manner that writs of error and appeals are allowed between the Circuit Courts and the Circuit Courts of Appeals. The laws of the United States relating to juries and jury trials are applicable to this District Court. The laws of the United States relating to appeals, writs of error, removal of causes and other matters and proceedings, as between the State and Federal courts, govern in such matters and proceedings between the courts of the United States and the courts of the Territory of Hawaii. Regular terms of the District Court are held at Honolulu on the second Mondays of April and October, and at Hilo on the last Wednesday of January of each year, and special terms at such times and places as the district judge deems expedient.[14]

Idaho constitutes one judicial district. This is divided into the Northern, Central and Southern Divisions. The counties of Idaho, Kootenai, Latah, Nez Perce and Shoshone, including any and all Indian reservations, constitute the Northern Division, the court for which is held at Moscow. The Central Division is composed of the counties of Aida, Boise, Blaine, Cassia, Canyon, Elmore, Lincoln, Owyhee and Washington, including any and all Indian reservations, the court for which is held at Boise City. The territory comprising the counties of Bingham, Bannock, Bear Lake, Custer, Fremont, Lemhi and Oneida, including any and all Indian reservations within such territory, constitutes the Southern Division, the court for which is held at Pocatello. Terms of the Circuit and the District courts are held at Moscow, beginning on the second Monday of May and the fourth Monday of October in each year, at Boise City beginning on the second Monday of March and the second Monday of September, and at the town of Pocatello on the second Monday of April and the first Monday of October.[15]

In *Illinois*, two districts,— the Northern and Southern. The Northern District of Illinois includes the counties of McDon-

[14] 31 St. at L. 158.

[15] 26 St. at L. 217; 27 St. at L. 72; 28 St. at L. 5; 30 St. at L. 423.

ough, Henderson, Warren, Fulton, Knox, Peoria, Tazewell, Woodford, Livingston, Stark, Henry, Rock Island, Putnam, Marshall, and Iroquois, with all the counties north of them. The Southern District of Illinois includes the remaining counties of the State. The Northern District is divided into two divisions, known as the Northern and Southern Divisions of the Northern District of Illinois. The Southern Division includes the counties of Peoria, Stark, Henry, Rock Island, Mercer, Henderson, Warren, Knox, McDonough, Fulton, Putnam, Marshall, Woodford, Tazewell, Livingston, and Iroquois. The Northern Division includes the remaining counties of the Northern District.

Terms of both the Circuit and District Courts for the Northern Division of the Northern District of Illinois are held at Chicago on the first Monday in July and the third Monday in December; and for the Southern Division of the Northern District at Peoria on the third Mondays of April and October. Terms of both courts in the Southern District of Illinois are held at Springfield on the first Mondays in January and June, and at Danville on the first Monday of May. Terms of the District Court alone are held at Cairo on the first Mondays of March and October.[16]

Indiana constitutes one judicial district. Terms of both Circuit and District Courts are held at Indianapolis on the first Tuesdays in May and November, at New Albany on the first Mondays in January and July, at Evansville on the first Mondays of April and October, at Hammond on the third Tuesdays of April and October, at Fort Wayne on the second Tuesdays in June and December in each year; and also twice a year at Fort Wayne at such time as the judges of said courts may designate.[17]

In *Iowa*, two districts,—the Northern and Southern. The counties of Clinton, Jones, Linn, Benton, Black Hawk, Grundy, Harding, Hamilton, Webster, Calhoun, Sac, Ida, Monona, and all the counties north of them, and the counties of Cedar, Johnston, Iowa, and Tama constitute the Northern District of Iowa. The remaining counties of the State constitute the Southern District. For the purposes of holding terms of court,

[16] U. S. R. S., §§ 536, 572, 658; 24 St. at L. 442; 26 St. at L. 212.

[17] U. S. R. S., §§ 531, 572, 658; 18 St. at L. 251; 20 St. at L. 166; 21 St. at L. 511, 571; 30 St. at L. 836.

the Northern Division of Iowa is divided into four divisions, known as the "Eastern," "Central," "Western," and "Cedar Rapids" Divisions of the Northern District of Iowa. The Eastern Division includes the counties of Jackson, Black Hawk, Buchanan, Delaware, Dubuque, Clayton, Fayette, Bremer, Floyd, Chickasaw, Mitchell, Howard, Winneshiek, and Allamakee. In this division, both Circuit and District Courts are held at Dubuque on the fourth Tuesday in April and the first Tuesday in December of each year. The Central Division includes the counties of Hamilton, Webster, Calhoun, Pocahontas, Palo Alto, Emmett, Kossuth, Humboldt, Wright, Hancock, Winnebago, Worth, Cerro Gordo, Franklin, and Butler. Terms of both Circuit and District Courts in this division are held at Fort Dodge on the second Tuesdays of June and November. The Western Division includes the counties of Monona, Woodbury, Plymouth, Sioux, Lyon, Osceola, O'Brien, Cherokee, Ida, Sac, Buena Vista, Clay, and Dickinson. Terms of both Circuit and District Courts in this division are held at Sioux City on the fourth Tuesday of May and the first Tuesday of October. The Cedar Rapids Division includes the counties of Cedar, Johnston, Iowa, Tama, Grundy, Hardin, Benton, Linn, Jones, and Clinton. Terms of both Circuit and District Courts for this division are held at Cedar Rapids on the first Tuesday of April and the second Tuesday of September.

For the purposes of holding terms of court the Southern District of Iowa is divided into four divisions, known as the Eastern, Central, Southern, and Western Divisions.

The Eastern Division includes the counties of Scott, Muscatine, Washington, Louisa, Keokuk, Davis, Wapello, Jefferson, Van Buren, Henry, Des Moines, and Lee. Terms of both Circuit and District Courts in this division are held, at Keokuk, on the second Tuesday of April and the third Tuesday of October. The Central Division includes the counties of Poweshiek, Mahaska, Jasper, Tama, Marshall, Story, Boone, Greene, Guthrie, Dallas, Polk, Madison, Warren, Marion, and Monroe. Terms of both Circuit and District Courts in this division are held at Des Moines, on the second Tuesday of May and the third Tuesday in November. The Western Division includes the counties of Carroll, Crawford, Harrison, Shelby, Audubon, Cass,

Pottawattamie, Mills, and Montgomery. Terms of both Circuit and District Courts in this division are held, at Council Bluffs, on the second Tuesday of March and the third Tuesday of September.

The Southern Division consists of the counties of Lucas, Clarke, Union, Adair, Adams, Fremont, Page, Taylor, Ringgold, Decatur, Wayne, and Appanoose. The Circuit and District Courts of that district are held in the Southern Division at Creston, Union county, on the fourth Tuesday of March and the third Tuesday of October.[18]

Kansas constitutes one judicial district. This is divided into three divisions. The Third Division consists of the counties of Miami, Luni, Bourbon, Crawford, Cherokee, Labette, Neosho, Allen, Anderson, Coffy, Woodson, Wilson, Montgomery, Chatauqua, Elk, and Greenwood. The Second Division is composed of the counties of Cowley, Butler, Harvey, McPherson, Rice, Ellsworth, Barton, Rush, Ness, Lane, Scott, Wichita, Greeley, Hamilton, Kearney, Finney, Garfield, Hodgeman, Pawnee, Stafford, Reno, Kingman, Pratt, Kiowa, Edwards, Ford, Gray, Haskell, Grant, Stanton, Morton, Sedgwick, Stevens, Seward, Meade, Clark, Comanche, Harper, Barber, and Sumner. The remaining counties of the State form the First Division.

Terms of the District and Circuit Courts are held at the city of Fort Scott, on the first Monday of May and the second Monday of November; at the city of Wichita, on the second Mondays of March and September. Terms of the District Court are held at Topeka on the second Monday in April; at Salina, on the second Monday of May; at Leavenworth, on the second Monday of October. Terms of the Circuit Court are held at Topeka, on the fourth Monday of November.[19]

[18] U. S. R. S., §§ 531, 572; 18 St. at L. 15; 21 St. at L. 155; 22 St. at L. 172; 25 St. at L. 87; 26 St. at L. 767; 27 St. at L. 1; 29 St. at L. 2; 31 St. at L. 249, 730; U. S. v. Kessel, 63 Fed. R. 433; In re Mason, 85 Fed. R. 145.

[19] U. S. R. S., §§ 531, 572, 658; 20 St. at L. 355; 25 St. at L. 392; 26 St. at L. 129; 27 St. at L. 24; 28 St. at L. 764. See McGlashern v. U. S., 71 Fed. R. 434. For special jurisdiction of the courts held in this district over controversies affecting the Gulf, Colorado & Santa Fé Railroad Company, and the Southern Kansas Railway Company, see 23 St. at L., ch. 177, § 8, p. 72; 23 St. at L., ch. 179, § 8, p. 75; Briscoe v. Southern Kan. Ry. Co., 40 Fed. R. 273.

In *Kentucky*, two judicial districts,— the Eastern and Western. The Eastern District includes the counties of Carroll, Trimble, Henry, Shelby, Anderson, Mercer, Boyle, Gallatin, Boone, Kenton, Campbell, Pendleton, Grant, Owen, Franklin, Bourbon, Scott, Woodford, Fayette, Jassamine, Garrard, Madison, Lincoln, Rockcastle, Pulaski, Wayne, Whitley, Bell, Knox, Harlan, Laurel, Clay, Leslie, Letcher, Perry, Owsley, Jackson, Estill, Lee, Breathitt, Knott, Pike, Floyd, Magoffin, Martin, Johnson, Lawrence, Boyd, Greenup, Carter, Elliott, Morgan, Wolfe, Powell, Menifee, Clark, Montgomery, Bath, Rowan, Lewis, Fleming, Mason, Bracken, Robertson, Nicholas, Harrison, with the waters thereof. The Western District includes the residue of said State of Kentucky, with the waters thereof. The regular terms of the Circuit and District Courts for the Eastern District are held at Frankfort, beginning on the second Monday in March and the fourth Monday in September; at Covington on the first Monday in April and the third Monday in October; at Richmond on the fourth Monday in April and the second Monday of November; at London on the second Monday in May and the fourth Monday in November. The regular terms for both these courts in the Western District are held at Louisville on the second Mondays of March and October; at Owensboro on the fourth Monday of November and the first Monday of May; at Paducah on the third Mondays of April and November; at Bowling Green on the third Monday of May and the second Monday of December.[20]

In *Louisiana*, two judicial districts,— the Eastern and Western. The Western District includes the parishes of Caddo, Bossier, Webster, Claiborne, Union, Morehouse, West Carroll, East Carroll, Madison, Richland, Ouachita, Lincoln, Bienville, Red River, De Soto, Sabine, Winn, Natchitoches, Jackson, Caldwell, Franklin, Tensas, Concordia, Catahoula, Grant, Vernon, Rapides, Avoyelles, Saint Landry, La Fayette, Saint Martin, Vermillion, Cameron, and Calcasieu. The remaining parishes form the Eastern District. The Western District is divided into three divisions. All process from the Circuit and District Courts of the Western District of Louisiana against defendants residing in the parishes of Saint Landry, Saint Mar-

[20] U. S. R. S., §§ 531, 572, 658; 21 St. at L. 45; 25 St. at L. 888, 889; 31 St. at L. 781, 788.

tin, Cameron, Calcasieu, La Fayette, and Vermillion, are returnable to Opelousas. All process from said courts against defendants residing in the parishes of Rapides, Vernon, Avoyelles, Catahoula, Grant, and Winn, are returnable to Alexandria. All process from said courts against defendants residing in the parishes of Caddo, De Soto, Bossier, Webster, Claiborne, Bienville, Natchitoches, Red River, and Sabine, are returnable at Shreveport. All process from said courts against defendants residing in the parishes of Ouachita, Franklin, Richland, Morehouse, East Carroll, West Carroll, Madison, Tensas, Concordia, Union, Caldwell, Jackson, and Lincoln are returnable at Monroe. The Eastern District is divided into two divisions. All process from the Circuit and District Courts for the Eastern District of Louisiana against defendants residing in the parishes of Pointe Coupee, West Baton Rouge, Iberville, Ascension, East Feliciana, West Feliciana, East Baton Rouge, Saint Helena, and Livingston are returnable to such courts at Baton Rouge. All process against defendants residing in the other parishes of the Eastern District are returnable at New Orleans. In the Western District, the terms of the Circuit and District Courts are held: at Opelousas, on the first Mondays of January and June; at Alexandria, on the fourth Mondays of January and June; at Shreveport, on the third Mondays of February and October; at Monroe, on the first Mondays of April and October. Terms of the District Courts for the Eastern District are held at New Orleans, on the third Mondays in February, May, and November. Terms of the Circuit Courts for the same district are held at New Orleans, on the fourth Monday in April and the first Monday in November. Terms of both courts are held at Baton Rouge on the second Mondays of April and November.[21]

Maine constitutes one judicial district. The terms of the District Court are held at Portland, on the first Tuesdays of February and December; at Bangor, on the first Tuesday of June; at Bath, on the first Tuesday of September. The terms of the Circuit Court are held at Portland, on the twenty-third days of April and September.[22]

[21] U. S. R. S., §§ 572, 658; 21 St. at L. 507; 25 St. at L. 888, 438; 31 St. at L. —.

[22] U. S. R. S., §§ 531, 572, 658; 23 St. at L. 1.

Maryland forms one judicial district, the District Courts of which are held at Baltimore on the first Tuesdays in March, June, September, and December. The terms of the Circuit Courts for the same district are held at Baltimore on the first Mondays in April and November. Terms of both courts are held at Cumberland on the second Monday of May and the last Monday of September.[23]

Massachusetts forms one judicial district. The terms of the District Courts are held at Boston on the third Tuesday in March, on the fourth Tuesday in June, on the second Tuesday in September, and on the first Tuesday in December. The terms of the United States Circuit Courts for this district are held at Boston, on the fifteenth days of May and October.[24]

In *Michigan*, two districts, the Eastern and Western; and the latter has a Northern and a Southern Division. The Northern Division of the Western District includes all the territory and waters of the upper peninsula of the State. The Southern Division of this district comprises all that portion of the southern or lower peninsula lying west of a line described as follows by the Revised Statutes: —

"Commencing at the southwest corner of Branch county, in said State, and running thence north on the west line of Branch and Calhoun counties, to the south line of Barry county; thence east on the north line of Calhoun and Jackson counties, to the southeast corner of Eaton county; thence north on the east boundary of Eaton county to the south line of Clinton county; thence west on the south boundary of said county to the southwest corner thereof; thence north on the west boundary of Clinton and Gratiot counties, to the south boundary of Isabella county; thence west on its south boundary, to the southwest corner of said last named county; thence north on the west line of Isabella and Clare counties, to the south boundary of Missaukee county; thence east, on its south boundary, to the southeast corner of Missaukee county; thence north, on the east line of Missaukee, Kalcaska, and Antrim counties, to the south boundary of Emmett county; thence east, to the southeast corner of Emmett county; thence north on the east boundary of Emmett county, to the straits of Mackinac; thence north to midway across said straits; thence westerly in a di-

[23] U. S. R. S., §§ 531, 572, 658; 27 St. at L. 11. [24] U. S. R. S., §§ 531, 572, 586.

rect line to a point on the shore of Lake Michigan where the north boundary of Delta county reaches Lake Michigan."

The Eastern District is also divided into two divisions known as the Northern and Southern Divisions. The following counties compose the Northern Division: Cheboygan, Presque Isle, Otsego, Montmorency, Alpena, Crawford, Oscoda, Alcona, Roscommon, Ogeman, Iosco, Clare, Gladwin, Arenac, Isabella, Midland Bay, Tuscola, Huron, Gratiot, Saginaw, Shiowassee, and Genesee. And the following counties constitute the Southern Division: Saint Clair, Lapeer, Sanilac, Macomb, Oakland, Livingston, Ingham, Clinton, Jackson, Washtenaw, Wayne, Branch, Hillsdale, Lenawee, Calhoun and Monroe. Terms of both Circuit and District Courts in the Southern Division of the Western District are held at Grand Rapids on the first Tuesdays of March and October; and in the Northern Division, at Marquette, on the first Tuesdays of May and September. At least two regular sessions of the Circuit and District Courts are held at Bay City in the Northern Division commencing on the first Tuesday of May and October in each year; and in the Southern Division at Detroit, on the first Tuesdays of March, June, and November. There is also a special or adjourned term of the District Court for the hearing of admiralty cases held at Bay City, beginning in the month of February of each year.[25]

Minnesota constitutes one judicial district, which is divided into six divisions, known as the First, Second, Third, Fourth, Fifth, and Sixth Divisions. That portion of the State of Minnesota comprising the counties of Winona, Wabasha, Olmsted, Dodge, Steele, Mower, Fillmore, and Houston constitute the First Division, the courts of which are held at Winona; the counties of Freeborn, Faribault, Martin, Jackson, Nobles, Rock, Pipestone, Murray, Cottonwood, Watonwan, Blue Earth, Waseca, Le Sueur, Nicollet, Brown, Redwood, Lyon, Lincoln, Yellow Medicine, Sibley, and Lac Qui Parle, constitute the Second Division, the courts of which are held at Mankato; the counties of Chicago, Washington, Ramsey, Dakota, Goodhue, Rice, and Scott constitute the Third Division, the courts of which are held at St. Paul; the counties of Hennepin, Wright, Meeker, Kandiyohi, Swift, Chippewa, Renville, McLeod, Carver, Anoka,

[25] U. S. R. S., §§ 538, 572, 658; 20 St. 67. See Bigelow v. Nickerson (C. C. taL. 175; 24 St. at L. 423; 28 St. at L. A.), 70 Fed. R. 113.

Sherburne, and Isanti constitute the Fourth Division, the courts of which are held at Minneapolis; the counties of Cook, Lake, St. Louis, Itasca, Cass, Crow Wing, Aitkin, Carlton, Pine, Kanabec, Mille Lacs, Morrison, and Benton constitute the Fifth Division, the courts of which are held at Duluth; the counties of Stearns, Pope, Stevens, Big Stone, Traverse, Grant, Douglas, Todd, Otter Tail, Wilkin, Clay, Becker, Wadena, Norman, Polk, Marshall, Kittson, Beltromi, and Hubbard constitute the Sixth Division, the courts of which are held at Fergus Falls.

The terms of the Circuit and District Courts are held, for the First Division, on the first Tuesdays of June and December; for the Second Division, on the third Tuesday of April and the first Tuesday of November; for the Third Division, on the fourth Tuesday of June and the second Tuesday of January; for the Fourth Division, on the first Tuesday in March and the first Tuesday in September; for the Fifth Division, on the second Tuesdays of May and October; and for the Sixth Division, on the fourth Tuesdays of March and September.[26]

In *Mississippi*, two districts, the Northern and Southern. The Northern District is subdivided into Eastern and Western Divisions. The Eastern Division of the Northern District includes the counties of Tishamingo, Alcorn, Prentiss, Itawamba, Lee, Pontotoc, Monroe, Chickasaw, Clay, Oktibbeha, Lowndes, Winston, Choctaw and Attala, as they existed June 15, 1882. The Western Division of the Northern District comprises the counties of Carroll, Bolivar, Coahoma, Tunica, De Soto, Tate, Marshall, Panola, Benton, Tippah, Sunflower, Montgomery, Grenada, Tallahatchee, La Fayette, Union, Webster, Calhoun, Quitman, and Yalabusha, as they existed in June, 1882.

Terms of both Circuit and District Courts in the Eastern Division of the Northern District are held at Aberdeen, on the first Mondays of April and October, to continue twenty-four judicial days if the business so long require. The terms of both courts for the Western Division are held at Oxford, on the first Mondays of June and December, to continue so long as the business may require. In the Northern District the judge is authorized to appoint and hold additional special terms.

The Southern District of Mississippi is divided into three

[26] U. S. R. S., § 531; 26 St. at L. 72, 73. For the power to execute process upon the open waters of the Great Lakes, see The Lindsay, 62 Fed. R. 851.

divisions. The Western Division consists of the counties of Washington, Sharkey, Inaquena, Motte, and Claiborne. The Eastern Division consists of the counties of Lauderdale, Kemper, Noxubee, Leake, Neshova, Newton, Jasper, Clarke, Wayne, and Jones. The Southern Division consists of the counties of Hancock, Harrison, Jackson, Marion, Perry, and Green. The terms of the Circuit and District Courts for the Western Division are held at Vicksburg, on the first Mondays of January and July in each year; for the Southern Division, at Biloxi, on the third Mondays of February and August; for the Eastern Division, at the city of Meriden on the second Mondays of March and September of each year, to continue three weeks.[27]

In *Missouri*, two districts, the Eastern and Western. The Eastern District of Missouri embraces the following counties: St. Louis, Franklin, Gasconade, Jefferson, Crawford, Washington, St. Francois, St. Genevieve, Dent, Iron, Madison, Perry, Bollinger, Cape Girardeau, Shannon, Reynolds, Wayne, Scott, Carter, Oregon, Ripley, Butler, Stoddard, New Madrid, Mississippi, Dunklin, Pemiscot, Montgomery, Lincoln, Warren, St. Charles, Macon, Adair, Clarke, Knox, Lewis, Marion, Monroe, Pike, Ralls, Schuyler, Scotland, Shelly, Randolph, and Audrain. The remaining counties of the State form the Western District.

There are two divisions in the Eastern District. The city of St. Louis and the counties of St. Louis, Franklin, Gasconade, Jefferson, Crawford, Washington, St. Francois, St. Genevieve, Dent, Iron, Madison, Perry, Bollinger, Cape Girardeau, Shannon, Reynolds, Wayne, Scott, Carter, Oregon, Ripley, Butler, Stoddard, New Madrid, Mississippi, Dunklin, Pemiscot, Montgomery, Lincoln, Warren, and St. Charles form the Eastern Division. The remaining counties of the Eastern District constitute the Northern Division.

The Western District of Missouri is divided into four divisions. The counties of Clay, Ray, Carroll, Chariton, Sullivan, Jackson, La Fayette, Saline, Cass, Johnson, Bates, Henry, Putnam, Caldwell, Livingston, Grundy, Mercer, Linn, and St. Clair form the Western Division of the Western District. The counties of Atchison, Nodaway, Holt, Andrew, Buchanan, Platte, Clinton, Harrison, Daviess, De Kalb, Gentry, and Worth form

[27] U. S. R. S., §§ 572, 658; 22 St. at St. at L. 78; 28 St. at L. 114; 30 St. L. 101, 103; 24 St. at L. 127, 430; 25 at L. 977, 995.

the St. Joseph Division. The counties of Cedar, Polk, Dallas, Laclede, Pulaski, Dade, Greene, Webster, Wright, Texas, Christian, Douglas, Howell, Taney, and Ozark form the Southern Division of the Western District. The counties of Jasper, Newton, Barton, Vernon, Barry, Lawrence, McDonald, and Stone form the Southwestern Division. The remaining counties of the Western District form the Central Division. In each of the divisions of the Eastern and Western Districts there are established a District and a Circuit Court of the United States. There are held two terms of the District and Circuit Courts in each year in each of the divisions. The times and places of holding the District Court in the Eastern District are, for the Eastern Division, at St. Louis, on the first Mondays in May and November; and for the Circuit Court, at the same place, on the third Mondays in March and September. For the Northern Division, for both courts, at Hannibal, on the first Mondays in May and November. Courts for the Western District are held as follows: Both courts at Kansas City, on the fourth Monday in April and the first Monday in November annually; both courts at St. Joseph, on the first Monday in March and the third Monday in September annually; both courts at Springfield, on the first Monday in April and the first Monday in October annually; both courts at Jefferson City, on the third Monday in March and the third Monday in October annually; both courts at Joplin, on the second Mondays of June and January.[28]

Montana constitutes one district. The Southern Division embraces the counties of Beaverhead, Madison, and Silver Bow. Terms of the Circuit and District Courts are held at Butte City on the first Tuesdays in February and September in each year.[29]

Nebraska forms one judicial district. The time and places of holding courts therein, Circuit and District, are at Omaha, on the first Monday of May and the second Monday of November; at Lincoln, on the third Monday of January and the first Monday of October; at Hastings, on the third Monday in April; and at Norfolk, on the fourth Monday of April.[30]

[28] U. S. R. S., §§ 540, 572, 658; 20 St. at L. 263; 24 St. at L. 424; 25 St. at L. 88, 498; 26 St. at L. 106, 369, 406; 27 St. at L. 20; 29 St. at L. 502; 31 St. at L. 789. See The L. B. X., 88 Fed. R. 290.

[29] 25 St. at L. 682; 27 St. at L. 252; 30 St. at L. 685.

[30] U. S. R. S., § 531; 25 St. at L. 443; 28 St. at L. 221.

Nevada forms one judicial district. The District Courts therein are held at Carson City, on the first Mondays in February, May, and October. And the Circuit Courts for the same are held at Carson City, on the third Monday of March and the first Monday of November of each year.[31]

New Hampshire forms one judicial district, the District Courts in which are held at Portsmouth on the third Tuesday in March and September, and at Concord, on the third Tuesday in June and December. The terms of the Circuit Court for the same are held at Portsmouth on the eighth day of May, and at Concord on the eighth day of October. A term of the Circuit and District Courts is held annually, on the last Tuesday of August, in the town of Littleton.[32]

New Jersey constitutes one judicial district, in which the terms of the District Court are held at Trenton on the third Tuesdays in January, April, June, and September. The terms of the Circuit Court for the same district are held at Trenton on the fourth Tuesdays in March and September in each year.[33]

In *New York*, four districts, the Western, Northern, Eastern, and Southern.

The Western District includes the counties of Allegheny, Cattaraugus, Chautauqua, Chemung, Erie, Genesee, Livingston, Monroe, Niagara, Ontario, Orleans, Schuyler, Seneca, Steuben, Wayne, Wyoming and Yates, with the waters thereof. The Northern District includes the counties of Albany, Brown, Cayuga, Chenango, Clinton, Cortland, Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Jefferson, Lewis, Madison, Montgomery, Oneida, Onondaga, Oswego, Rensselaer, Saint Lawrence, Saratoga, Schenectady, Scoharie, Tioga, Tompkins, Warren and Washington, with the waters thereof. The Eastern District includes the counties of Richmond, Kings, Queens, Vernon and Suffolk, with the waters thereof. The Southern District includes the residue of the State, with the waters thereof. The Revised Statutes granted to the District Courts of the Southern and Eastern Districts of New York concurrent jurisdiction over the waters within the counties of New York, Kings, Queens, and Suffolk, and over all seizures made and all matters done in such waters.

[31] U. S. R. S., §§ 532, 572; 19 St. at L. 4.

[32] U. S. R. S., §§ 572, 658; 21 St. at L. 330.

[33] U. S. R. S., §§ 531, 572, 658.

The terms of the District Court for the Western District of New York are held at Elmira on the second Tuesday of January; at Buffalo on the second Tuesdays of March and November; at Rochester, on the second Tuesday of May; at Jamestown, on the second Tuesday of July; at Lockport, on the second Tuesday of October; for the hearing of motions and for the trial of causes in admiralty and for proceedings in bankruptcy in Buffalo at least two weeks in each month, except August, unless the business is sooner disposed of.

The terms of the Circuit Court for the Western District of New York are held at Rochester on the second Tuesday of May; at Canandaigua, on the second Tuesday of September; at Buffalo, on the second Tuesday of November.

The terms of the District Courts for the Northern District of New York at Albany, on the second Tuesday of February; at Utica, on the first Tuesday of December; at Binghamton, on the second Tuesday of June; at Auburn, on the first Tuesday of October; at Syracuse, on the first Tuesday of April; and in the discretion of the judge of the court, one term annually at such time and place as he may appoint, by a notice of at least twenty days, published in a newspaper published at the place where the court is held, in the counties of Saratoga, Onondago, Saint Lawrence, Clinton, Jefferson, Oswego and Franklin.

The terms of the Circuit Court for the Northern District of New York are held at Utica on the first Tuesday of December; at Syracuse, on the first Tuesday of April; and at Albany, on the second Tuesday of February.

District and Circuit Courts for the Eastern District of New York are held at Brooklyn on the first Wednesday in every month.

The terms of the District Court for the Southern District of New York are held in the city of New York, on the first Tuesday in every month. The terms of the Circuit Court for the same district are held at the city of New York on the first Monday in April, and the third Monday in October; and for the trial of criminal causes and suits in equity, on the last Monday in February; and, exclusively for the trial and disposal of criminal cases and matters arising and pending in said court, on the second Wednesdays in January, March, and May, on the third Wednesday in June, and on the second Wednes-

days in October and December: "*Provided*, that the holding of any of the last-mentioned terms for criminal business shall not dispense with nor affect the holding of any other term of court at the same time, and that the pending of any other term of court shall not prevent the holding of any of said terms for criminal business." [34]

In *North Carolina*, two judicial districts, the Eastern and the Western. The Western District includes the counties of Mecklenburg, Cabarras, Stanly, Montgomery, Davie, Davidson, Randolph, Guilford, Rockingham, Stokes, Forsyth, Union, Anson, Caswell, Alamance, Orange, Clay, Cherokee, Swain, Macon, Jackson, Graham, Haywood, Transylvania, Henderson, Buncombe, Madison, Yancey, Mitchell, Watauga, Ashe, Alleghany, Caldwell, Burke, McDowell, Rutherford, Polk, Cleveland, Gaston, Lincoln, Catawba, Alexander, Wilkes, Surry, Iredell, Yadkin, and Rowan, and all counties which have been formed within this territory since June 4th, 1879. The Eastern District includes the residue of the State. The terms of District and Circuit Courts for the Western District of North Carolina are held at Greensborough, on the first Mondays in April and October; at Statesville, on the third Mondays in April and October; at Asheville, on the first Mondays in May and November; and at Charlotte, on the second Mondays of June and December. The terms of the District Court for the Eastern District of North Carolina are held at Elizabeth City, on the third Mondays in April and October; at Newberne, on the fourth Mondays in April and October; at Wilmington on the first Mondays after the fourth Mondays in April and October; and at Raleigh on the fourth Monday of May, and the first Monday of December. The terms of the Circuit Court for the same district are held at Raleigh on the first Monday in June and first Monday in December; and at Newberne on the fourth Mondays in April and October; and at Wilmington, on the first Mondays after the fourth Mondays in April and October.[35]

North Dakota constitutes one judicial district, which is divided into four divisions, known as the Southwestern, South-

[34] U. S. R. S., §§ 541, 542, 572, 658; 22 St. at L. 32, 33; 31 St. at L. 175, 176. See *supra*, § 23; Coudert v. U. S., 85 Fed. R. 844; Jones v. Navigation Co., 11 Blatchf. 844.

[35] U. S. R. S., §§ 543, 572, 658; 20 St. at L. 178; 28 St. at L. 274, 275; 31 St. at L. 274.

eastern, Northeastern, and Northwestern Divisions. The portion of the State comprising the counties of Burleigh, Stutsman, Logan, McIntosh, Emmons, Kidder, Foster, Wells, McLean, and all territory in said State of North Dakota lying south and west of the Missouri River constitute the Southwestern Division, as said counties were bounded on April 26, 1890, the court for which is held at the city of Bismarck. That portion of the State comprising the present counties of Cass, Richland, Barnes, Sargent, Dickey, La Moure, Ransom, Griggs, and Steele constitutes the Southeastern Division, as said counties were bounded on April 26, 1890, the court for which is held at the city of Fargo. The portion of the State comprising the present counties of Grand Forks, Traill, Walsh, Pembina, Cavalier, and Nelson, as said counties were bounded on April 26, 1890, constitutes the Northeastern Division, the court for which is held in the city of Grand Forks. That portion of the State comprising the present counties of Ramsey, Eddy, Benson, Towner, Rolette, Bottineau, Pierce, McHenry, and Ward, and all the territory in said State of North Dakota lying north of the Southwestern Division, constitute the Northwestern Division, as said counties were bounded April 26, 1890, the court for which is held in the city of Devil's Lake. The terms of the District and Circuit Courts are held each year for the Southwestern Division at Bismarck on the first Tuesday of March; for the Southeastern Division at Fargo on the third Tuesday of May; for the Northeastern Division at Grand Forks on the second Tuesday of November; and for the Northwestern Division at Devil's Lake on the first Tuesday of July.[36]

In *Ohio*, two districts,—the Northern and the Southern. The Southern District includes the counties of Belmont, Guernsey, Muskingum, Licking, Franklin, Madison, Champaign, Shelby, and Mercer, as they existed February 10, 1855, with all the counties south of them, and also the counties of Union, Delaware, Morrow, Knox, Coshocton, Harrison, and Jefferson. The Northern District includes the residue of the State.

The Northern District of Ohio is divided into two divisions. The counties of Williams, Defiance, Paulding, Van Wert, Mercer, Auglaize, Allen, Putnam, Henry, Fulton, Lucas, Wood, Hancock, Hardin, Logan, Marion, Wyandot, Seneca, Sandusky, Ot-

[36] 25 St. at L. 676; 26 St. at L. 67, 68; 28 St. at L. 642.

tawa, Erie, and Huron form the Western Division. The remaining counties in the said district form the Eastern Division.

The Southern District of Ohio is divided into two divisions. The Eastern Division consists of the counties of Union, Delaware, Morrow, Knox, Coshocton, Harrison, Jefferson, Madison, Fayette, Franklin, Pickaway, Ross, Pike, Gallia, Jackson, Meigs, Vinton, Athens, Hocking, Fairfield, Licking, Perry, Muskingum, Morgan, Washington, Noble, Monroe, Belmont, and Guernsey. The Western Division includes the remaining counties of said district.

The terms of the Circuit and District Courts for the Northern District of Ohio are held in Cleveland, in the Eastern Division, on the first Tuesdays of February, April, and October; and in Toledo, in the Western Division, on the first Tuesdays of June and December of each year. The terms of both courts for the Southern District are held at Cincinnati on the first Tuesdays in February, April, and October, and at Columbus on the first Tuesdays in June and December.[37]

Oregon constitutes one judicial district, in which the terms of the District Court are held at Portland on the first Mondays in March, July and November. The Circuit Court for the same district is held at Portland on the second Monday of April and the first Monday of October.[38]

In *Porto Rico* there is one district. The District Court of the United States for Porto Rico has the ordinary jurisdiction of the District Courts of the United States, jurisdiction of all cases cognizant in the Circuit Courts of the United States, and proceeds therein in the same manner as a Circuit Court; and jurisdiction over all controversies where the parties, or either of them, are citizens of the United States, or citizens or subjects of a foreign State or States; wherein the matter in dispute exceeds, exclusive of interest or costs, the sum or value of $1,000.[38a] The laws of the United States relating to appeals, writs of error and *certiorari*, removal of causes and other matters and proceedings as between the courts of the United States and the courts of the several States govern in such matters and proceedings as between the District Court of the United States and the courts of Porto Rico. Regular terms of the court are held at San Juan commencing on the

[37] U. S. R. S., §§ 544, 572, 650; 20 St. at L. 101; 21 St. at L. 68; 22 St. at L. 176.

[38] U. S. R. S., §§ 531, 572, 658; 18 St. at L. 76; 19 St. at L. 4.

[38a] 31 St. at L. 953.

second Mondays of April and October, and also at Ponce on the second Monday of January in each year, and special terms are also held at Mayague at such other stated times as the district judge deems expedient. Writs of error and appeals from the final decisions of the Supreme Court of Porto Rico and the District Court of the United States are allowed, and taken to the Supreme Court of the United States in the same manner and under the same regulations and in the same cases as from the Supreme Courts of the Territories; and such writs of error and appeal are allowed in all cases where the Constitution of the United States, or a treaty thereof, or an act of Congress is brought in question and the right claimed thereunder is denied. The Supreme and District Courts of Porto Rico and the judges thereof may grant writs of *habeas corpus* in all cases in which the same can be made by the judges of the District and Circuit Courts of the United States.[39]

In *Pennsylvania*, three districts. The Western District includes the counties of Fayette, Greene, Washington, Allegheny, Westmoreland, Somerset, Bedford, Clearfield, McKean, Jefferson, Cambria, Indiana, Armstrong, Butler, Beaver, Mercer, Crawford, Venango, Erie, Warren, and Bradford, as they existed April 20, 1818. The Middle District includes the counties of Lackawanna, Wyoming, Bradford, Monroe, Wayne, Pike, Susquehanna, Carbon, Tioga, Potter, Cameron, Clinton, Lycoming, Center, Union, Snyder, Mifflin, Juniata, Northumberland, Montour, Columbia, Sullivan, Luzerne, Dauphin, Lebanon, Perry, Huntingdon, Fulton, Franklin, Adams, York, and Cumberland. The Eastern District includes the rest of the State. The terms of the District Court for the Eastern District of Pennsylvania are held at Philadelphia on the third Mondays in February, May, August, and November. The terms of the Circuit Court for the same district are held at Philadelphia on the first Mondays in April and October. The terms of both courts for the Middle District are held at Scranton on the first Mondays of March and October; at Williamsport on the second Mondays of January and June; and at Harrisburg on the first Monday of May and the second Monday of November. The terms of the District Court for the Western District are held at Pittsburgh on the first Monday in May and on the third Monday

[39] 31 St. at L. 84, 85.

in October; at Williamsport on the third Monday in June and on the first Monday in October; at Erie on the second Monday in January and the third Monday in July; and at Scranton on the first Mondays of March and September. The terms of the Circuit Court for the same district are held at Erie on the second Monday of January and third Monday of July; at Pittsburgh on the second Mondays in May and November; at Williamsport on the third Mondays in June and September; and at Scranton on the first Mondays of March and September.[40]

Rhode Island constitutes one judicial district, in which the terms of the District Court are held at Providence on the first Tuesdays in February and August; at Newport on the second Tuesday in May and on the third Tuesday in October. The Circuit Court for the same district is held at Providence on the fifteenth days of June and November.[41]

In *South Carolina* there is but one judicial district, which has been divided into two divisions called in the statute the Eastern and Western Districts. The Western District includes the counties of Lancaster, Chester, York, Union, Spartanburgh, Greenville, Pendleton, Abbeville, Edgefield, Newburry, Laurens, and Fairfield, as they existed February 21, 1823. The Eastern District includes the residue of the State.

The terms of the Circuit Court are held in Florence on the first Tuesday of March; in Greenville on the third Tuesdays of April and October; in Columbia on the fourth Tuesday of November; in Charleston on the first Tuesday of April. Terms of the District Court for the Western District are held at Florence on the first Tuesday of March; at Greenville on the third Tuesdays of April and October; for the Eastern District at Charleston on the first Tuesdays of June and December; and at Columbia on the fourth Tuesday of March.[42]

South Dakota constitutes one judicial district, which is divided into four divisions known as the Southern, Northern, Central and Western Divisions. The counties of Clay, Union, Yankton, Turner, Lincoln, Bonhomme, Charles Mix, Douglas,

[40] U. S. R. S., §§ 545, 572, 658; 24 St. at L. 336; 31 St. at L. 880.

[41] U. S. R. S., §§ 531, 572, 658.

[42] U. S. R. S., §§ 546, 572, 658; 25 St. at L. 655; 26 St. at L. 71; 27 St. at L. 261; 30 St. at L. 769; 31 St. at L. —. There is but one Circuit Court for both districts. 25 St. at L. 655; 26 St. at L. 71; Armour Co. v. London, 66 Fed. R. 161; Lucker v. Phœnix Assur. Co. of London, 66 Fed. R. 161; Rosencrans v. U. S., 165 U. S. 257; *supra*, § 221.

Hutchinson, Brule, Aurora, Davison, Hanson, McCook, Minnehaha, Moody, Lake, Sanborn, Lyman, Miner, Gregory, Todd, Beadle and Kingsbury, Crow Creek and Lower Brule and the Yankton Indian reservation constitute the Southern Division, the court for which is held at Sioux Falls. The counties of Brookings, Hamlin, Denel, Grant, Roberts, Codington, Clark, Day, Marshall, Spink, Brown, McPherson, Edmunds, Campbell, Walworth, and the Sisseton and Wahpton Reservation constitute the Northern Division, the court for which is held at the city of Aberdeen. The counties of Potter, Sully, Faulk, Hand, Hyde, Hughes, Buffalo, Jerauld, Stanley, Nowlin, and that portion of the counties of Pratt, Jackson and Sterling not included in any Indian reservation, and the Standing Rock and Cheyenne Indian Reservations, constitute the Central Division, the court for which is held at the city of Pierre. All that portion of the State of South Dakota lying west of the Central and Southern Divisions, and in addition thereto the Rosebud and Red Cloud Indian reservations, constitute the Western Division, the court for which is held at the city of Deadwood.

The terms of the Circuit and District Courts are as follows: At Sioux Falls, on the first Tuesday in April and the third Tuesday in October; at Pierre, on the first Tuesdays in March and October; at Deadwood, on the first Tuesday in February and September, and at Aberdeen the first Tuesday of May and the third Tuesday of November.[42]

In *Tennessee*, three districts,— the Eastern, Western, and Middle. The Eastern District includes the counties of Anderson, Bledsoe, Blount, Bradley, Campbell, Carter, Claiborne, Cocke, Cumberland, Fentress, Grainger, Greene, Hamilton, Hancock, Hawkins, Jefferson, Johnson, Knox, McMinn, Marion, Meigs, Monroe, Morgan, Polk, Rhea, Roane, Scott, Sevier, Sullivan, Union, James, Sequatchie, Hamblen, and Washington, as they existed February 19, 1856. The Western District includes the counties of Benton, Carroll, Henry, Obion, Dyer, Gibson, Lauderdale, Haywood, Tipton, Shelby, Fayette, Hardeman, McNairy, Hardin, Madison, Henderson, and Weakley, as they existed June 18, 1838. The Middle District includes the residue of the State. The Western District of Tennessee is divided into

[42] 28 St. at L. 5.

two divisions, called the Eastern and Western Divisions. The Eastern Division includes the counties of Benton, Carroll, Decatur, Gibson, Hardeman, Henderson, Henry, McNairy, Madison, Hardin, Lake, Crockett, Weakley, and Obion. The terms of the Circuit and District Courts of the Eastern Division are held therein at Jackson, at least twice in each year, at such times as the judges thereof respectively fix. The remaining counties embraced in this district constitute the Western Division thereof. The terms of the Western Division District and Circuit Courts are held at Memphis on the fourth Mondays in May and November.

The Eastern District of Tennessee is divided into three divisions, known as the Northern, Northeastern, and Southern Divisions. The Northeastern Division includes the counties of Johnson, Carter, Umcoi, Sullivan, Washington, Greene, Hawkins, Hancock, Cocke, and Hamblen. The Southern Division includes the counties of Hamilton, James, Polk, McMinn, Bradley, Meigs, Rhea, Marion, Sequatchie, Bledsoe, Fentress, and Cumberland. The Northern Division consists of the remaining counties in the district. The District and Circuit Courts for the Eastern District are held at Knoxville on the second Mondays in March and September; at Chattanooga on the first Mondays of April and October, and at Greeneville on the second Mondays of May and November.[44]

In *Texas*, three districts, the Northern, Eastern, and Western. The Northern District is composed of the counties of Brazos, Robertson, Leon, Limestone, Freestone, Navarro, Ellis, Kaufman, Dallas, Rockwall, Hunt, Concha, Tarrant, Johnson, Hill, McLennan, Falls, Bell, Coryell, Hamilton, Bosque, Comanche, Erath, Somervell, Hood, Parker, Palo Pinto, Jack, Wise, Clay, Archer, Wichita, Wilbarger, Hardeman, Knox, Baylor, Haskell, Throckmorton, Young, Stephens, Shackelford, Jones, Taylor, Callahan, Eastland, Brown, Coleman, Runnels, Nolan, Fisher, Stonewall, King, Cottle, Childress, Collingsworth, Wheeler, Hemphill, Lipscomb, Ochiltree, Roberts, Gray, Donley, Hall, Motley, Dickens, Kent, Scurry, Mitchell, Howard, Borden, Dawson, Gaines, Martin, Andrews, Garza, Crosby, Floyd, Briscoe, Armstrong, Carson, Hutchinson, Hansford, Sher-

[44] U. S. R. S., §§ 542, 547, 548, 572, 658; 18 St. at L. 480; 20 St. at L. 206; 21 St. at L. 751, 757; 22 St. at L. 402; 23 St. at L. 280; 29 St. at L. 89; 30 St. at L. 814; 31 St. at L. 5, 183, 785.

man, Moore, Potter, Randall, Lubbock, Deaf Smith, Oldham, Glasscock, Sterling, Coke, Tom Green, Crockett, Schleicher, Sutton, Orion, Mills, Menard, Hartley, and Foard.

The Eastern District is composed of the counties of Matagorda, Wharton, Brazoria, Fort Bend, Colorado, Austin, Waller, Harris, Galveston, Montgomery, Walker, Grimes, Madison, Trinity, Angelina, Shelby, Nacogdoches, Cherokee, Houston, Anderson, Henderson, Smith, Rusk, Panola, Harrison, Gregg, Upshur, Wood, Vanzandt, Rains, Hopkins, Camp, Titus, Marion, Cass, Bowie, Franklin, Morris, Red River, Jackson, Lamar, Fannin, and Delta, together with the counties of Jefferson, Orange, Newton, Jasper, Hardin, Liberty, Tyler, San Augustine, Sabine, Polk and San Jacinto, which form an Eastern Division, and so much of the Indian Territory as is thereto annexed by the Act of March 1, 1889. That Act provides, "that the Chickasaw Nation, in the portion of the Choctaw Nation within the following boundaries, to wit: beginning on Red River, at the southeast corner of the Choctaw Nation; thence north with the boundary line between the said Choctaw Nation and the State of Arkansas, to a point where Big Creek, a tributary of the Black Fork of the Kimshi River, crosses the said boundary line; thence westerly with Big Creek and the said Black Fork to the junction of the said Black Fork with Buffalo Creek; thence northwesterly with said Buffalo Creek to a point where the same is crossed by the old military road from Fort Smith, Arkansas, to Boggy Depot, in the Choctaw Nation; thence southwesterly with the said road to where the same crosses Perryville Creek; thence northwesterly up said Creek to where the same is crossed by the Missouri, Kansas, and Texas Railway track; thence northerly up the centre of the main track of the said road to the South Canadian River; thence up the centre of the main channel of the said river to the western boundary line of the Chickasaw Nation, the same being the northwest corner of the said Nation; thence south on the boundary line between the said Nation and the reservation of the Wichita Indians; thence continuing south with the boundary line between the said Chickasaw Nation and the reservation of the Kiowa, Comanche, and Apache Indians to Red River; thence down said river to the place of beginning. And all that portion of the Indian Territory not annexed to the district of Kansas by the Act approved January sixth, eight-

een hundred and eighty-three, and not set apart and occupied by the five civilized tribes, shall, from and after the passage of this Act, be annexed to and constitute a part of the eastern judicial district of the State of Texas, for judicial purposes." "The counties of Lamar, Fannin, Red River, and Delta, of the State of Texas, and all that part of the Indian Territory attached to the said eastern judicial district of the State of Texas by the provisions of this Act, shall constitute a division of the eastern judicial district of Texas." The counties of Grayson, Cooke, Montague, Collin, and Denton shall constitute a division of the eastern judicial district of Texas.

The Western District includes the counties of Calhoun, Aransas, Victoria, Goliad, Refugio, Bee, San Patricio, Nueces, Cameron, Hidalgo, Starr, Zapata, Duval, Encinal, Webb, La Salle, McMullen, Live Oak, De Witt, Lavaca, Gonzales, Wilson, Karnes, Atascosa, Frio, Dimmit, Zavala, Maverick, Kinney, Uvalde, Medina, Bexar, Guadalupe, Caldwell, Fayette, Washington, Lee, Burleson, Milan, Williamson, Bastrop, Travis, Hays, Comal, Kendall, Blanco, Burnett, Llano, Gillespie, Kerr, Bandera, Edwards, Kimball, Mason, Menard, El Paso, Presidio, Pecos, McCulloch, San Saba, and Lampasas. The terms of the District and Circuit Courts for the Northern District of Texas are held at Dallas, Dallas county, on the third Monday of January and the fourth Monday of May; at Fort Worth, Tarrant county, on the first Monday of March and the fourth Monday of October; at Abilene, Taylor county, on the first Monday of April and the fourth Monday of September; at San Angelo, Tom Green county, on the third Monday of April and the third Monday of November; at Waco, McLennan county, on the fourth Monday of April and the second Monday of October.

The terms of the Circuit and District Courts for the Eastern District of Texas are held at Beaumont on the first Mondays of June and December, at Sherman upon such days as the judges shall fix and after due notice, and at "Paris on the third Mondays in April and the second Mondays in October; and the United States courts herein provided to be held at Paris shall have exclusive original jurisdiction of all offenses committed against the laws of the United States within the limits of that portion of the Indian Territory attached to the eastern judicial district of the State of Texas by the provisions of this Act, of which jurisdiction is not given by this Act to the court herein

established in the Indian Territory; and all civil process, issued against persons resident in the said counties of Lamar, Fannin, Red River, and Delta cognizable before the United States courts, shall be made returnable to the courts, respectively, to be held at the city of Paris, Texas. And all prosecutions for offenses committed in either of said last mentioned counties shall be tried in the division of said eastern district of which said counties form a part: *Provided*, that no process issued or prosecution commenced or suit instituted before the passage of this Act, shall be in any way affected by the provisions thereof."

The terms of the Circuit and District Courts for the Western District of Texas are held at Brownsville, on the first Monday of January and the second Monday of June; at San Antonio, on the first Mondays of May and November; at El Paso, on the first Mondays in April and October; at Austin, on the first Mondays in February and July; and at Laredo on the third Monday of March and the first Monday of December.

Process against defendants residing in the counties of Webb, Zapata, Duval, Encinal, La Salle and McMullen is returned to Laredo.[45]

Utah constitutes one judicial district, which is divided into two divisions, known as the Northern and Central. The counties of Weber, Davis, Morgan, Rich, Cache and Boxelder constitute the Northern Division, the court for which is held at Ogden. The remaining counties compose the Central Division, the court for which is held at Salt Lake City. The terms of the District and Circuit Courts are held at Salt Lake City, beginning on the first Monday of May and the first Monday of December, and at the city of Ogden, beginning on the first Monday of March and the first Monday of September.[46]

Vermont constitutes one judicial district, for which the terms of the District and Circuit Courts are held at Burlington, on the fourth Tuesday in February; at Windsor, on the third Tues-

[45] U. S. R. S., §§ 548, 572, 658; 20 St. at L. 318; 21 St. at L. 10, 148; 23 St. at L. 35, 148; 25 St. at L. 786, 787; 26 St. at L. 3. See 29 St. at L. 456, 516; 30 St. at L. 240, 397, 812, 1002; 31 St. at L. 27, 74, 218, 798. See In re Jackson, 40 Fed. R. 372. For special jurisdiction of the courts held in this district over controversies affecting the Gulf, Colorado & Santa Fé Railroad Company, see 23 St. at L., ch. 177, § 8, p. 72; 23 St. at L., ch. 179, § 8, p. 975; Briscoe v. Southern Kan. Ry. Co., 40 Fed. R. 273.

[46] 28 St. at L. 620; 29 St. at L. 110.

day in May; and at Rutland, on the first Tuesday in October. One of the terms of both courts may, when adjourned, be adjourned to meet at Montpelier.[47]

In *Virginia*, two districts, the Eastern and Western. The Western District includes the counties of Albemarle, Alleghany, Amherst, Appomattox, Augusta, Bath, Bedford, Bland, Botetourt, Buchanan, Buckingham, Campbell, Carroll, Charlotte, Clarke, Craig, Cumberland, Floyd, Franklin, Frederick, Fluvanna, Giles, Grayson, Greene, Halifax, Henry, Highland, Lee, Madison, Montgomery, Nelson, Patrick, Page, Pulaski, Pittsylvania, Rappahannock, Roanoke, Rockbridge, Rockingham, Russell, Scott, Smyth, Shenandoah, Tazewell, Washington, Wise, Wythe, and Warren. The Eastern District includes the residue of the State. The terms of the District and the Circuit Court for the Eastern District are held at Richmond, on the first Mondays in April and October; at Alexandria, on the first Mondays in January and July; and at Norfolk, on the first Mondays in May and November. The terms of the same courts for the Western District are held at Danville, on the Tuesdays after the second Mondays in April and November; at Lynchburg, on the Tuesdays after the second Mondays in March and September; at Abingdon, on the Tuesdays after the first Mondays in May and October; and at Harrisonburgh, on the Tuesdays after the first Mondays in June and December.[48]

Washington constitutes one judicial district, which is divided into four divisions, the Eastern, Southern, Northern, and Western. The counties of Spokane, Stevens, Okanogan, Douglas, Lincoln, Adams, and Kittitass, including any and all Indian reservations in one or more of said counties, constitute the Eastern Division, the court for which is held at the city of Spokane Falls. The counties of Whitman, Asotin, Garfield, Columbia, Walla Walla, Franklin, Yakima, and Klickitat, including any and all Indian reservations in one or more of said counties, constitute the Southern Division, the court for which is held at the city of Walla Walla. The counties of Whatcom, Skagit, San Juan, Island, Snohomish, Clallam, Jefferson, Kitsap, and King, including any and all Indian reservations in one or

[47] U. S. R. S., §§ 531, 572, 658; 18 St. at L. 53; 28 St. at L. 29.

[48] U. S. R. S., §§ 549, 572, 658; 21 St. at L. 324; 26 St. at L. 474. As to the boundary between Virginia and West Virginia, see Bluefield Water Works & Imp. Co. v. Sanders, 63 Fed. R. 333.

more of said counties, constitute the Northern Division, the court for which is held at the city of Seattle. The counties of Pierce, Mason, Thurston, Chehalis, Pacific, Lewis, Wahkiakum, Cowlitz, Clarke, and Skamania, including any and all Indian reservations in one or more of said counties, constitute the Western Division, the court for which is held at the city of Tacoma.

The terms of the Circuit and District Courts of the United States are held, for the Eastern Division, at Spokane Falls, on the first Tuesdays of September and April; for the Southern Division, at Walla Walla, on the first Tuesdays of November and May; for the Northern Division, at Seattle, on the first Tuesdays of December and June; and for the Western Division, at Tacoma, on the first Tuesdays of February and July.[49]

In *West Virginia*, two districts, the Northern and Southern. The Northern District includes the counties of Hancock, Brooke, Ohio, Marshall, Tyler, Pleasants, Wood, Wirt, Ritchie, Doddridge, Wetzel, Monongalia, Marion, Harrison, Lewis, Gilmer, Calhoun, Upshur, Barbour, Taylor, Preston, Tucker, Randolph, Pendleton, Hardy, Grant, Mineral, Hampshire, Morgan, Berkeley, and Jefferson. The Southern District includes the residue of the State and the waters thereof. The terms of both courts for the Northern District are held at Wheeling, on the first Tuesday of April and the third Tuesday of September; at Clarksburg, on the third Tuesday of April and the first Tuesday of October; and at Parkersburg on the second Tuesdays of January and June. For the Southern District, at Charleston, on the first Tuesday of May and the second Tuesday of November; at Huntington, Cabell county, on the first Tuesday of April and the third Tuesday of September; at Bluefield, Mercer county, on the first Tuesdays of June and December. The terms of the Circuit Court for the same district are also held at Parkersburg, on the tenth days of January and June. When either of these dates falls on Sunday, the term will commence on the following Monday.[50]

In *Wisconsin* two districts, the Eastern and Western. The Western District includes the counties of Rock, Jefferson, Dane,

[49] 25 St. at L. 682; 26 St. at L. 45. at L. 151; 27 St. at L. 14, 254; 31 St.
[50] U. S. R. S., §§ 531, 572, 658; 20 St. at L. 738.
at L. 27, 259; 23 St. at L. 655; 25 St.

Green, Grant, Columbia, Iowa, Lafayette, Sauk, Richland, Crawford, Vernon, La Crosse, Monroe, Adams, Juneau, Buffalo, Chippewa, Dunn, Clark, Jackson, Eau Claire, Pepin, Marathon, Wood, Pierce, Polk, Portage, St. Croix, Trempealeau, Douglas, Barron, Burnett, Ashland, and Bayfield. The Eastern District includes the residue of the State. The terms of the District and Circuit Courts for the Eastern District of Wisconsin are held at Oshkosh, on the second Tuesday of June, and at Milwaukee, on the first Mondays of January and October. The same courts for the Western District of Wisconsin are held at Madison, on the first Monday in June; at La Crosse, on the third Tuesday in September, and at Superior, on the third Tuesday of June.[51]

Wyoming constitutes one district, which is attached to the Eighth Circuit, and includes the Yellowstone National Park. The terms of the District and Circuit Courts are held at Cheyenne, commencing on the second Mondays of May and November, and at the town of Evanston, on the first Monday of July. One session of both courts is also held at the town of Sheridan, annually, and other sessions at any other place and on such dates as the courts may order.[52]

§ 27. Sources of Federal equity practice.— The Revised Statutes provide:

"The Supreme Court shall have power to prescribe, from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceeding to obtain relief, of drawing up, entering, and enrolling decrees, and of proceeding before trustees appointed by the court, and generally to regulate the whole practice to be used in suits in equity or admiralty, by the Circuit and District Courts." [1]

"The several Circuit and District Courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme

[51] U. S. R. S., §§ 550, 572, 658; 18 St. at L. 75; 27 St. at L. 12; 31 St. at L. 218, 219; Bigelow v. Nickerson (C. C. A.), 70 Fed. R. 118.

[52] 26 St. at L. 225; 27 St. at L. 39, 73; 28 St. at L. 73.

§ 27. [1] U. S. R. S., § 917.

Court under the preceding section, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters, in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."[2] These statutes are constitutional.[3]

Under these provisions the Supreme Court has from time to time promulgated ninety-four rules of equity practice; and most of the inferior courts have also adopted rules of their own. The ninetieth rule of the Supreme Court, which was promulgated in March, 1842, provides that, "in all cases where the rules prescribed by this court or by the Circuit Court do not apply, the practice of the Circuit Court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice." Of this rule Judge Sawyer said: —

"The jurisdiction of this court is derived from the Constitution and laws of the United States; and these rules are simply rules of practice, for regulating the mode of proceeding in the courts. They do not, and could not, properly, either limit or enlarge the jurisdiction of the court. The rule quoted simply regulates the practice in exercising the jurisdiction of the court in those respects wherein the rules adopted do not apply; but the practice of the High Court of Chancery is to be applied, not as controlling, but simply as furnishing just analogies to regulate the practice."[4]

By reference to these sources and the decisions of the courts resulting from them, the practice at equity in the courts of the United States must be determined.[5]

[2] U. S. R. S., § 918.

[3] Wayman v. Southard, 10 Wheat. 1; Beers v. Houghton, 9 Peters, 338, 359; White v. Toledo, St. L. & K. C. R. Co., 79 Fed. R. 133.

[4] Lewis v. Shainwald, 7 Saw. 403, 405.

[5] The first American edition of Daniell's Chancery Practice and the second American edition of Smith's Practice, both of which were published in 1837, are the authoritative works which best explain the English chancery practice in 1841. Note by Mr. Justice Bradley in Thomson v. Wooster, 114 U. S. 104, 112.

CHAPTER II.

PERSONS WHO MAY BE PLAINTIFFS OR DEFENDANTS IN A SUIT IN EQUITY.

§ 28. General rule as to persons capable of being plaintiffs. All persons may file a bill in equity in their own right, except alien enemies, infants, idiots, lunatics, married women, and possibly those who by the laws of a State have been declared civilly dead.

§ 29. States as plaintiffs.— A State may sue as plaintiff in any court of the United States which has jurisdiction of the case.[1] A State cannot sue in the Supreme Court of the United States to collect a judgment for a penalty recovered in the court of such State against a corporation chartered by another State.[2]

§ 30. Alien enemies as plaintiffs.— Subjects of a country at war with the United States cannot sue in the State or Federal courts before the conclusion of peace, unless they are residents of this country or within the jurisdiction of one of our allies.[1] If a complainant become an alien enemy after a suit has been begun, the defense may be interposed by plea or answer.[2] The effect of such a defense is then, however, merely to suspend the cause of action and suit, not to dismiss the bill.[3]

§ 31. Married women as plaintiffs.— A married woman originally could only sue when joined with her husband, unless he had deserted her, and was without the realm or civilly dead, when she could sue alone;[1] or unless the suit concerned her

§ 29. [1] Ames v. Kansas, 111 U. S. 449; U. S. v. Louisiana, 123 U. S. 32; *supra*, § 14.

[2] Wisconsin v. Pelican Ins. Co., 127 U. S. 265.

§ 30. [1] Wilcox v. Henry, 1 Dall. 69; Crawford v. The William Penn, 1 Pet. C. C. 106; Mumford v. Mumford, 1 Gall. 366; Clarke v. Morey, 10 Johns. (N. Y.) 69; 2 Kent's Com. 63.

[2] Bell v. Chapman, 10 Johns. (N. Y.) 183.

[3] Hutchinson v. Brock, 11 Mass. 119; Parkinson v. Wentworth, 11 Mass. 26; Levine v. Taylor, 12 Mass. 8; Hamersley v. Lambert, 2 Johns. Ch. (N. Y.) 508; Ex parte Boussmaker, 13 Ves. 71; Wilcox v. Henry, 1 Dall. 69; Story's Eq. Pl., § 54. But see Mumford v. Mumford, 1 Gall. 366.

§ 31. [1] Story's Eq. Pl., § 61; Countess of Portland v. Prodgers, 2 Vern. 104.

separate property, when she was obliged to sue by her next friend.[2] The next friend, however, was chosen by herself;[3] and the husband was then usually made a party defendant, that he might have an opportunity to assert any claim he might have to the subject-matter of the suit.[4] In the courts of the United States, however, the rule was early laid down as follows: "Where the wife complains of the husband and asks relief against him she must use the name of some other person in prosecuting the suit; but where the acts of the husband are not complained of, he would seem to be the most suitable person to unite with her in the suit. This is a matter of practice within the discretion of the court."[5] In the Circuit Courts held in the districts of New York, where a married woman has substantially all the powers of a spinster, she may sue in equity, as if she were single, at least if she be a citizen of that State.[6] In the Circuit Courts in the districts of California the rule is otherwise.[7] When a suit has been begun by a married woman alone who should have sued by her next friend, leave to amend by adding to the title the name of a next friend will always be granted.[8]

§ 32. Suits on behalf of infants.— The equity rules provide that "all infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami;* subject, however, to such orders as the court may direct for the protection of infants and other persons."[1] It has never been decided whether this changes the former practice, which was as follows: An infant could only sue by his next friend,[2] who might be any person that would undertake the suit in his behalf, subject, however, to the costs and the censure of the court, if it were improperly brought.[3] The next friend might, at any time,

[2] Wake v. Parker, 2 Keen. 70; Story's Eq. Pl., § 63.

[3] Story's Eq. Pl., § 61; Gamber v. Atlee, 2 De G. & Sm. 745.

[4] Sigel v. Phelps, 7 Sim. 239; Wake v. Parker, 2 Keen. 70; Story's Eq. Pl., § 63.

[5] Mr. Justice McLean in Bein v. Heath, 6 How. 228, 240. See Douglas v. Butler, 6 Fed. R. 228.

[6] Lorillard v. Standard Oil Co., 2 Fed. R. 902. But see Taylor v. Holmes, 14 Fed. R. 499, 514; U. S. v. Pratt Coal & Coke Co., 18 Fed. R. 708; O'Hara v. MacConnell, 93 U. S. 150.

[7] Wills v. Pauly, 51 Fed. R. 257.

[8] Douglas v. Butler, 6 Fed. R. 228; Taylor v. Holmes, 14 Fed. R. 499.

§ 32. [1] Rule 87.

[2] Rule 87; Story's Eq. Pl., § 57; Dudgeon v. Watson, 23 Fed. R. 161; Bradwell v. Weeks, 1 J. Ch. (N. Y.) 325.

[3] Campbell v. Campbell, 2 M. & C.

be removed by the court either summarily or after a reference, if it seemed for the best interest of the infant to appoint another.[4] It was doubtful whether insolvency and consequent inability to respond for costs was, in itself, a ground for the next friend's removal.[5] That might, however, be a reason for an order directing him to give security for costs.[6] The court might, at any time, order a reference to a master, to determine the propriety of a suit; and, if it appeared to have been brought against the infant's interest, would stay proceedings in it or dismiss the bill, with costs to be paid by the next friend.[7] This could be done even without a reference.[8] No such reference would, it seems, be ordered at the request of the next friend himself,[9] unless there were another cause pending by reason of which the infant's property was subject to the control of the court, when such a reference might be ordered at the instigation of a next friend, and he be paid his costs out of the estate even if the bill were finally dismissed.[10] An application to dismiss a bill as improperly filed on behalf of an infant might be made by a person "as next friend for the purpose of this application,"[11] or by a defendant to the bill.[12] It seems that any motion clearly for the interest of an infant complainant could be made by a next friend for the purpose of the application, when the next friend who filed the bill refused to move.[13] If two suits were instituted on behalf of the same infant for the same purpose by two next friends, the court would direct a master to inquire which is most for the infant's benefit.[14] A bill might be filed by a next friend on behalf of a child still in its mother's womb.[15]

If an infant were made co-plaintiff with others, and it ap-

25, 30; Sale v. Sale, 1 Beav. 586; Starten v. Bartholomew, 6 Beav. 143.

[4] Nalder v. Hawkins, 2 M. & K. 243; Russell v. Sharpe, 1 Jac. & W. 482.

[5] Anon., 1 Ves. Jr. 409.

[6] Fulton v. Rosevelt, 1 Paige (N. Y.), 178, 180.

[7] Da Costa v. Da Costa, 3 P. Wms. 140; Nalder v. Hawkins, 2 M. & K. 243; Sale v. Sale, 1 Beav. 586. See King v. McLean Asylum of Massachusetts General Hospital, 64 Fed. R. 335; *infra*, § 38.

[8] Sale v. Sale, 1 Beav. 586.

[9] Jones v. Powell, 2 Mer. 141.

[10] Taner v. Ivie, 2 Ves. Sen. 466.

[11] Guy v. Guy, 2 Beav. 460.

[12] Fox v. Suwerkrop, 1 Beav. 583.

[13] Furtado v. Furtado, 6 Jur. 227; Cox v. Wright, 9 Jur. (N. S.) 981; Guy v. Guy, 2 Beav. 460.

[14] Calvert on Parties (2d ed.), 418.

[15] Luterel's Case, cited Prec. Ch. 50; Musgrave v. Parry, 2 Vern. 710.

peared that it would be more for his advantage that he should be made a defendant, an order to strike out his name as plaintiff, and to make him a defendant, might be obtained upon motion.[16] When a bill was filed in behalf of an infant, his coming of age did not abate the suit; but he might then elect whether he would proceed with it or not.[17] If he chose to go on with the suit, all further proceedings could be carried on without any amendment or the filing of a supplemental bill.[18] He was then liable for all costs of the suit, as if he had filed the bill after he came of age.[19] Otherwise, he was not personally chargeable with costs;[20] unless he made a motion to dismiss the bill; which it seems could only be done upon the payment of costs by himself,[21] if he could not establish that the bill was improperly filed by his next friend.[22] If the next friend died during the infant's minority, and the latter took no step in the cause after he had come of age, the defendant might have the bill dismissed, but without costs, since there would then be no one living who was liable to pay them.[23] The suit is brought in the name of the infant, not in that of the next friend,[24] and the infant's citizenship is the test of the jurisdiction.[25]

§ 33. Suits on behalf of idiots, lunatics, and persons of weak mind.— Idiots and lunatics sue by their committees or guardians, if they have any, otherwise by next friends.[1] It is the usual practice to join them as plaintiffs with their representatives, though it might be held unnecessary to do so when one has a committee authorized by statute to sue in his name.[2] If the interest of the committee be adverse to that of his ward, the latter should sue by a next friend.[3] Although the practice is unsettled, it would be advisable to have the next friend

[16] Tappen v. Norman, 11 Ves. 563.

[17] Guy v. Guy, 2 Beav. 460.

[18] Hoffman's Ch. Pr. 60; Daniell's Ch. Pr. (2d Am. ed.) 102.

[19] Daniell's Ch. Pr. (2d Am. ed.) 102.

[20] Waring v. Crane, 2 Paige (N. Y.), 79.

[21] Waring v. Crane, 2 Paige (N. Y.), 79.

[22] Turner v. Turner, 2 Stra. 708.

[23] Morgan v. Potter, 157 U. S. 195.

[24] Woolridge v. McKenna, 8 Fed. R. 650; *supra*, § 19.

[25] Ibid.

§ 33. [1] Rule 97; Hoffman's Ch. Pr. 61.

[2] See Ortley v. Messere, 7 Johns. Ch. (N. Y.) 139; Harrison v. Rowan, 4 Wash. C. C. 202; Palmer, Attorney-General, v. Parkhurst, 1 Chan. Cas. 112; Gorham v. Gorham, 8 Barb. Ch. (N. Y.) 24; Hoffman's Ch. Pr. 61; Story's Eq. Pl., § 65, and notes.

[3] Compare Attorney-General v. Tiler, 1 Dick. 378; Hoffman's Ch. Pr. 61.

appointed by the court.[4] Where a volunteer applied for the writ of *habeas corpus* on behalf of a person whom he alleged to be wrongfully confined as a lunatic, the court appointed another guardian *ad litem* with the direction that he examine the facts and use his own discretion in determining whether to continue the proceeding.[5] If a plaintiff become a lunatic after the institution of a suit, a supplemental bill may be filed in the joint names of the lunatic and of the committee of his estate, which will answer the same purpose as a bill of revivor in procuring the benefit of former proceedings.[6] If a committee die and a new committee is appointed after a suit has been instituted by the former for the benefit of his idiot or lunatic, the proper way of continuing the suit is by a supplemental bill filed by the idiot or lunatic and the new committee.[7] In England, a committee, usually before the institution of a suit, prayed the sanction of the Lord Chancellor by a petition, which was often referred to a master.[8] If a person of full age is neither an idiot nor a lunatic, and is yet incapable of managing his affairs, the court may appoint a next friend to sue for him.[9] If a bill has been filed in the name of a plaintiff, who, at the time of filing it, is in a state of mental incapacity, it may, on motion, be taken off the file.[10] If, however, after a suit has been properly instituted, a plaintiff becomes imbecile, the bill cannot for that reason be taken off the file.[11]

§ 34. Capacity of foreign executors, administrators, and receivers to sue.—Foreign executors and administrators, under which term are included those appointed in other States than that where the court is held, cannot sue until they have taken out ancillary letters of administration.[1] A foreign administrator may sue to recover damages for the death of his intestate

[4] Compare Attorney-General v. Tiler, 1 Dick. 378; Hoffman's Ch. Pr. 61; Story's Eq. Pl., § 64, and notes.

[5] King v. McLean Asylum, 64 Fed. R. 331; *supra*, § 32; *infra*, § 867.

[6] See Brown v. Clark, 3 Woodeson's Lect. 378; Daniell's Ch. Pr. 108.

[7] In re Reynolds, Shelf on Lun. 417; Daniell's Ch. Pr. 108.

[8] In re Webb, Shelf on Lun. 417; Daniell's Ch. Pr. 108.

[9] Wartnaby v. Wartnaby, Jac. 377; Owing's Case, 1 Bland (Md.), 370, 373; Story's Eq. Pl., § 66.

[10] Wartnaby v. Wartnaby, Jac. 377; Story's Eq. Pl., § 66.

[11] Wartnaby v. Wartnaby, Jac. 377.

§ 34. [1] Fenwick v. Sears, 1 Cranch, 259; Dixon v. Ramsay, 3 Cranch, 319; Doe v. McFarland, 9 Cranch, 151; Kerr v. Moon, 9 Wheat. 565; Mason v. Hartford, Providence & Fishkill R. Co., 19 Fed. R. 53; Duchesse d'Auby v. Porter, 41 Fed. R. 68; Johnson v.

under a statute of the State of his appointment.[2] A foreign executor may sue without ancillary letters when the title is vested in him as trustee by devise.[3] To what extent foreign receivers have the right to sue is unsettled.[4] The better rule would seem to be, that they can always sue, no matter where, unless by so doing they would appropriate assets upon which domestic creditors would otherwise have a prior lien, or otherwise impugn the public policy of the State in which the action is brought.[5] It has been said that when the receiver is the statutory successor of a corporation he can always sue in a foreign court;[6] that where he has received a voluntary assignment of the assets of an insolvent, or has acquired title to the same through involuntary proceedings in insolvency or otherwise, he probably will be permitted to do so;[7] but that where his appointment is purely interlocutory, as the hand of the court to complete the incidents of the litigation, he cannot.[8]

§ 35. Who may be defendants to a bill in equity.— All persons may be made defendants to a bill in equity except the

Powers, 139 U. S. 156, 158. An act of Congress authorizes them to sue without ancillary letters in the District of Columbia. 24 St. at L. 431; Overby v. Gordon, 177 U. S. 214. The New Jersey statute to the same effect is followed by the Federal courts in that State. Hayes v. Pratt, 147 U. S. 557. The omission is cured by the issue of ancillary letters at any time before the hearing. Hodges v. Kimball (C. C. A.), 91 Fed. R. 845. See *infra*, § 164.

[2] McCarty v. N. Y., L. E. & W. R. Co., 62 Fed. R. 437.

[3] De Forest v. Thompson, 40 Fed. R. 375.

[4] In the following cases they were not allowed to sue: Booth v. Clark, 17 How. 322; Brigham v. Luddington, 12 Blatchf. 237; Olney v. Tanner, 10 Fed. R. 101; Hazard v. Durant, 19 Fed. R. 471, 476; s. c. on appeal, 21 Blatchf. 540; Ex parte Norwood, 3 Biss. 504; Hunt v. Jackson, 5 Blatchf. 349; Cuykendall v. Miles, 10 Fed. R. 342; Hurd v. Elizabeth, 41 N. J. Law (12 Vroom), 1; Toronto General Trust Co. v. C., B. & Q. R. Co., 123 N. Y. 37, 47.

[5] Rogers v. Riley, 80 Fed. R. 759; Hale v. Hardon, 89 Fed. R. 283; Falk v. Jones, 49 N. J. Eq. 484; Lobenheimer v. Wheeler, 45 N. J. Eq. 614; Metzner v. Berner, 98 Ind. 425; Comstock v. Fredrickson, 51 Minn. 350; Stoddard v. Lum, 159 N. Y. 265; Gilman v. Ketcham, 84 Wis. 60. Mr. High said in the third edition of his valuable work on Receivers (§ 241, p. 211): "It is believed that the doctrine will ultimately be established giving to receivers the same rights of action in all States of the Union with which they are invested in the State or jurisdiction in which they are appointed."

[6] Hale v. Hardon, 89 Fed. R. 283, 288; Relfe v. Rundle, 103 U. S. 222; Rogers v. Riley, 80 Fed. R. 759.

[7] Hale v. Hardon, 89 Fed. R. 283, 289. But see Hollander v. Hechheimer, 162 U. S. 327.

[8] Booth v. Clark, 17 How. 322, 331; Hazard v. Durant, 19 Fed. R. 471; Hale v. Hardon, 89 Fed. R. 283, 289.

United States;[1] foreign States and sovereigns for acts done in a political capacity;[2] "one of the United States by citizens of another State, or by citizens or subjects of any foreign State;"[3] receivers appointed by State courts without the leave of such courts;[4] and foreign executors and administrators,[5] unless they have assets within the jurisdiction of the court where the bill is filed.[6] Whether a suit can be brought against the President of the United States is undecided.[7]

§ 36. The United States as a defendant.—The United States may waive their exemption from suit by statute,[1] but not by the act of any of their officers.[2] When, however, the United States institute a suit, they waive their exemption so far as to allow a presentation by the defendant of any set-off, legal and equitable, to the extent of the demand made or property claimed; and when they proceed *in rem*, they open to consideration all claims and equities in regard to the property libeled.[3] Where property of the United States is involved in a litigation to which they are but technically parties, the attorney for the district where the suit is brought may intervene by way of suggestion; and in such a case the court will either stay the suit or adjust its judgment according to the rights disclosed on the part of the government;[4] but in such case no judgment can be entered against the United States for costs or divest them of their title to property.[5] An action of ejectment has been sustained against government officers sued

§ 35. [1] Carr v. U. S., 98 U. S. 433.

[2] Duke of Brunswick v. King of Hanover, 6 Beav. 1; Hullett v. King of Spain, 2 Bligh N. R. 31.

[3] 11th Amendment to Constitution.

[4] Barton v. Barbour, 104 U. S. 126; Thompson v. Scott, 4 Dill. 508; Express Co. v. Railroad Co., 99 U. S. 191.

[5] Vaughn v. Northrup, 15 Pet. 1; Story's Eq. Pl., § 179.

[6] Sandilands v. Innes, 3 Sim. 363; McNamara v. Dwyer, 7 Paige (N. Y.), 239; Campbell v. Tousey, 7 Cow. (N. Y.) 64.

[7] See Mississippi v. Johnson, 4 Wall. 475; People ex rel. Broderick v. White, 156 N. Y. 136, and cases cited.

§ 36. [1] U. S. v. Clarke, 8 Pet. 436; The Siren, 7 Wall. 152.

[2] Carr v. U. S., 98 U. S. 433.

[3] Mr. Justice Field in The Siren, 7 Wall. 152, 154. A more liberal rule against the government is suggested in Fifth Nat. Bank v. Long, 7 Biss. 502; Elliot v. Van Voorst, 3 Wall. Jr. 299; Briggs v. The Light Boats, 11 Allen (Mass.), 157; Stanley v. Schwalby, 162 U. S. 255, 272.

[4] Stanley v. Schwalby, 147 U. S. 508, 513; The Exchange, 7 Cranch, 116, 147. But see Stanley v. Schwalby, 162 U. S. 255.

[5] Stanley v. Schwalby, 162 U. S. 255, 272.

as individuals for land, such as a soldiers' cemetery[6] and a pier[7] held by them for governmental purposes in the name of the United States; but the United States are not bound by any adjudication in such a suit.[8] An officer of the United States,[9] even a cabinet officer,[10] may be enjoined from an act in violation of the complainant's rights, such as the revocation of the approval by his predecessor of the maps of a right of way over public lands, which is not discretionary and which is beyond the scope of his authority; but not from the infringement of a patent right in the use of government property.[11] The only remedies of the patentee in such a case are a suit against the United States upon an implied contract for the use of the patent[12] and an action at common law against the infringing officers.[13] Papers on file in a Department of the government cannot be obtained by replevin.[14]

The Tucker Act, passed in 1887, provides that in "all claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, or for damages liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity or admiralty, if the United States were suable, . . . the District Courts of the United States shall have concurrent jurisdiction with the Court of Claims as to all matters named in the preceding section, where the amount of the claim does not exceed one thousand dollars; and the Circuit Courts of the United States shall have such concurrent jurisdiction in all cases where

[6] U. S. v. Lee, 106 U. S. 196; Stanley v. Schwalby, 147 U. S. 508; Tindal v. Wesley, 167 U. S. 204. But see Stanley v. Schwalby, 162 U. S. 255.

[7] Scranton v. Wheeler (C. C. A.), 57 Fed. R. 803, 807.

[8] U. S. v. Lee, 106 U. S. 196, 223; Stanley v. Schwalby, 147 U. S. 508; s. c., 162 U. S. 255, 272; Scranton v. Wheeler, 57 Fed. R. 803, 807; Tindal v. Wesley, 167 U. S. 204, 223.

[9] Caldwell v. Robinson, 59 Fed. R. 653, 660.

[10] Noble v. Union R. L. R. Co., 147 U. S. 165, 171.

[11] Belknap v. Schild, 161 U. S. 10, 17; Cammeyer v. Newton, 94 U. S. 225, 235; *infra*, § 442.

[12] U. S. v. Palmer, 128 U. S. 262; *infra*, § 442. But see Schillinger v. U. S., 155 U. S. 163.

[13] Belknap v. Schild, 161 U. S. 10, 18; Cammeyer v. Newton, 94 U. S. 225, 235.

[14] Brent v. Hagner, 5 Cranch, C. C. 71; 6 Op. A. G. 223.

the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars. All cases brought and tried under the provisions of this act shall be tried by the court without a jury; . . . provided, however, that nothing in this section shall be construed as giving to either of the courts herein mentioned jurisdiction to hear and determine claims growing out of the late Civil War, and commonly known as 'war claims,' or to hear and determine other claims which have heretofore been rejected or reported on adversely by any court, department, or commission authorized to hear or determine the same."[15] By a later act, suits to recover fees, salary or compensation for official services are withdrawn from the jurisdiction of the Circuit and District Courts, and must be brought in the Court of Claims.[16] The same courts are similarly given jurisdiction over "all set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the government of the United States against any claimant against the government," in such courts.[17] Under this act a suit may be brought to recover the purchase price paid upon void entries of public land;[18] by a contractor for extra work done by him under the direction of a government agent authorized to order the same, and for damages for an improper interference by such agent with the fulfillment of the contract.[19] Where a suit was brought by an army officer against the United States for indemnity on account of a judgment recovered against and paid by him on account of his seizure and use of a boat for the benefit of the government, under the orders of his superior officer, it was held that, if the liability of the United States was in tort, no action would lie, and that if the liability was upon an implied contract, it arose when the seizure was made, not when the judgment was recovered.[20] A public officer may sue the United States to recover money due him for the performance of his official acts.[21] No suit will lie under this act to enforce spe-

[15] 24 St. at L. 605.
[16] 30 St. at L. 495.
[17] 24 St. at L., ch. 359, § 1, p. 505.
[18] Emmons v. U. S., 42 Fed R. 26.
[19] Bowe v. U. S., 42 Fed. R. 761.
[20] Carpenter v. U. S., 42 Fed. R. 264. In Junker v. Fobes, 45 Fed. R. 840, 841, Judge Toulmin said: "If the cause of action, as stated in the declaration, arises from a breach of promise, the action is *ex contractu;* but if the cause of action arises from a breach of duty, growing out of the contract, it is *ex delicto*, and case."
[21] U. S. v. McDermott, 140 U. S. 157.

cific performance of a contract, nor one founded upon a claim which is not a claim for money.[22] "The words 'hear and determine' are used four times,— once as applied to the Court of Claims, twice as applied to that court and to the Circuit and District Courts, and again as applied to any court, department, or commission. These words must be taken to be used in each instance in the same sense, and as implying an adjudication conclusive as between the parties, in the nature of a judgment or award. The proviso that nothing in this section shall be construed as giving to either of the courts named in the act jurisdiction to hear and determine any claims 'which have heretofore been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same,' must be limited to a rejection of a claim, or an adverse report thereon, by a court, department, or commission which determines the rights of the parties, such as the approval by the Secretary of the Treasury of an account of expenses under the captured and abandoned property acts,[23] or the decision of an international commission. Moreover, the Court of Claims, even before the passage of the Act of 1887, had jurisdiction of claims under an act of Congress or under a contract, and could therefore hear and determine claims for legal salaries or fees.[24] We cannot believe that the Act of 1887, entitled 'An act to provide for the bringing of suits against the government of the United States,' the manifest scope and purpose of which are to extend the liability of the government to be sued, was intended to take away a jurisdiction already existing, and to give to the decisions of accounting officers an authority and effect which they never had before."[25] Consequently, the rejection of a claim by the First Comptroller of the Treasury, which is only conclusive within the Department of the Treasury, is not a bar to such a suit.[26] The same act regulates the practice in such suits in the Circuit and District Courts as follows: The plaintiff must file a peti-

[22] U. S. v. Jones, 131 U. S. 1, 19. See chapter on Court of Claims, *infra*.

[23] U. S. v. Johnson, 124 U. S. 236, 8 Sup. Ct. R. 446.

[24] Meade v. U. S., 9 Wall. 691.

[25] Meade v. U. S., 18 Ct. Cl. 281; s. c., 109 U. S. 146; Adams v. U. S., 20 Ct. Cl. 115; U. S. v. McDonald, 128 U. S. 471; U. S. v. Jones, 131 U. S. 1, 18.

[26] U. S. v. Harmon, 147 U. S. 268; s. c. as Harrison v. U. S., 41 Fed. R. 560; U. S. v. Rand (C. C. A.), 53 Fed. R. 848; U. S. v. Jones, 131 U. S. 1, 18.

tion duly verified with the clerk of the respective courts having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered, and must pray the court for a judgment or decree based upon the facts and the law.[27] The plaintiff must cause a copy of his petition, after filing the same, to be served upon the district attorney of the United States in the district wherein suit is brought, and must mail another copy by registered letter to the Attorney-General of the United States; and must thereupon file with the clerk of the court wherein the suit is instituted, an affidavit of such service and mailing.[28] The United States appears by the district attorney, and is allowed sixty days, or as much more time as the court may in its discretion allow, within which to file a plea, answer, or demurrer; "and to file a notice of any counter-claim, set-off, claim for damages, or other demand or defense whatsoever, of the government in the premises: provided, that should the district attorney neglect or refuse to file the plea, answer, demurrer, or defense, as required, the plaintiff may proceed with the case under such rules as the court may adopt in the premises." But the plaintiff cannot have a judgment or decree in his favor unless he establishes the same by proof satisfactory to the court.[29] In the Court of Claims the claimant must "in all cases fully set forth in his petition the claim, the action thereon in Congress or by any of the departments, if such action has been had; what persons are owners thereof or interested therein; when and upon what consideration such persons became so interested; that no assignment or transfer of said claim, or any part thereof, or interest therein, has been made, except as stated in the petition; that said claimant is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets; that the claimant, and, where the claim has been assigned, the original and every prior owner thereof, if a citizen, has at all times borne

[27] Mr. Justice Gray, Colt, C. J., concurring, in Harmon v. U. S., 43 Fed. R. 560, 564, 565.

[28] 24 St. at L. 506.

[29] 24 St. at L. 506.

true allegiance to the government of the United States, and, whether a citizen or not, has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government; and that he believes the facts as stated in said petition to be true. And the said petition shall be verified by the affidavit of the claimant, his agent or attorney."[30] It is the duty of the court, acting under the Act of 1887, to cause a written opinion to be filed in the cause, "setting forth the specific findings by the court of the facts therein, and the conclusions of the court upon all questions of law involved in the case, and to render judgment thereon. If the suit be in equity or admiralty, the court shall proceed with the same according to the rules of such court."[31] Judgment may be rendered in favor of the United States for the balance due upon a counterclaim.[32] If the United States puts in issue the right of the plaintiff to recover, the court may in its discretion allow costs to the prevailing party, which, however, cannot exceed what is actually incurred for witnesses, "and for summoning the same, and fees paid to the clerk of the court."[33] From the date of final judgment or decree against the government, interest is allowed "to be computed thereon, at the rate of four per centum per annum, until the time where an appropriation is made for the payment of the judgment or decree."[34] It has been held that no interest can be allowed before judgment, except upon a contract which stipulates for interest.[35] The plaintiff can appeal where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of the court below, under U. S. R. S., § 1089.[36] Before the creation of the Circuit Courts of Appeal, an appeal or writ of error under this act was heard by and returnable to the Supreme Court,[37] not to the Circuit Court.[38] Since the Evarts Act, unless a question of jurisdiction, a constitutional question, or the construction of a treaty is involved,

[30] U. S. R. S., § 1072.

[31] 24 St. at L., ch. 359, § 7, p. 506.

[32] U. S. v. Saunders (C. C. A.), 79 Fed. R. 407; McElrath v. U. S., 102 U. S. 426.

[33] 24 St. at L. 508, § 15. See U. S. v. Harmon, 147 U. S. 268, 282.

[34] 24 St. at L. 507, § 10.

[35] Int. B. & S. Dock Co. v. U. S., 60 Fed. R. 523, 527; U. S. R. S., § 1091.

[36] 24 St. at L. 506, § 9; U. S. R. S., § 707; U. S. v. Davis, 131 U. S. 36, 39; Strong v. U. S., 40 Fed. R. 183.

[37] U. S. v. Davis, 131 U. S. 36.

[38] Strong v. U. S., 40 Fed. R. 183.

the Circuit Court of Appeals is the first court of review,[39] except in cases of appeals from the Court of Claims.[40] A judgment in a suit to recover official fees, salary or compensation is ordinarily reviewable by writ of error, not by appeal.[41] A judgment in a suit to recover rent is reviewable by writ of error.[42] Such appeal or writ of error should be taken within ninety days after the judgment is rendered.[43] An appeal or writ of error may be taken, irrespective of the amount involved, by the district attorney, at the direction of the Attorney-General, within six months after the judgment or decree.[44] Otherwise, the practice in all courts in suits brought under this statute is similar to that in other suits, with "such additions and modifications as said courts may adopt."[45] A recent act of Congress grants to the Circuit Courts jurisdiction of suits in equity brought by any tenant in common or joint tenant for the partition of lands in cases where the United States is one of such tenants in common or joint tenants, such suit to be brought in the Circuit Court of the district in which such land is situated. It further provides: "That when such suit is brought by any person owning an undivided interest in land, other than the United States against the United States alone and against the United States and any other of such owners, service shall be made on the United States by causing a copy of the bill filed to be served upon the district attorney of the district wherein the suit is brought, or by mailing a copy of the same by registered letter to the Attorney-General of the United States; and the complainant in such bill shall file with the clerk of the court in which such bill is filed an affidavit of such service and of the mailing of such letter. It shall be the duty of the district attorney upon whom service of the bill is made as aforesaid to appear and defend the interests of the government, and within sixty days after service upon him as

[39] U. S. v. Morgan (C. C. A.), 64 Fed. R. 4.

[40] U. S. R. S., § 707.

[41] U. S. v. Harsha, 172 U. S. 567; U. S. v. Ady (C. C. A.), 76 Fed. R. 359; U. S. v. Tinsley (C. C. A.), 75 Fed. R. 369; U. S. v. Morgan (C. C. A.), 64 Fed. R. 4; U. S. v. Fletcher (C. C. A.), 60 Fed. R. 53.

[42] Chase v. U. S., 155 U. S. 489.

[43] 24 St. at L. 506, § 9; U. S. R. S., § 708. But see U. S. v. Davis, 131 U. S. 36, 39.

[44] 24 St. at L., ch. 359, 507, § 10; U. S. v. Davis, 131 U. S. 36, 39; U. S. v. Yukers, 60 Fed. R. 641.

[45] 24 St. at L., ch. 359, 506, § 4.

hereinabove prescribed, unless the time shall be enlarged by order of the court made in the case, to file a plea, answer or demurrer on the part of the government, and the cause shall proceed as other cases for partition by courts of equity, and in making such partition the court shall be governed by the same principles of equity that control courts of equity in partition proceedings between private persons. Whenever in such suit the court shall order a sale of the property, or any part thereof, the Attorney-General of the United States may, in his discretion, bid for the same in behalf of the United States. And if the United States shall be the purchaser, the amount of the purchase-money shall be paid from the treasury of the United States upon a warrant drawn by the Secretary of the Treasury on the requisition of the Attorney-General."[46]

§ 37. Liability of States to suits by private persons.— Under the Constitution of the United States as originally adopted, it was provided that the judicial power of the United States should extend to controversies "between a State and citizens of another State."[1] This was held to subject a State to liability to an action by a citizen of another State.[2] The decision was opposed to the opinions of Marshall and others, as expressed in the conventions which ratified the Constitution,[3] and was repugnant to the feelings of the people. Consequently, the Eleventh Amendment was adopted. This enacted that "the Judicial Power of the United States shall not be construed to extend to any suit, in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any Foreign State." It has effectually prevented the successful prosecution by a private individual of a suit against a State as a party defendant, even a suit against the plaintiff's own State upon a claim founded upon the Constitution of the United States.[4] Cases have, however, often arisen where, although a State was not a formal party, yet it had rights which it claimed would be affected by the determination of the suit before the court. To

[46] 30 St. at L. 339.

§ 37. [1] Art. III, sec. 2.

[2] Chisholm v. Georgia, 2 Dall. 419.

[3] See Elliott's Debates. In Hans v. Louisiana, 134 U. S. 1, Bradley, J., speaking for the court, said that Chisholm v. Georgia was erroneously decided.

[4] Hans v. Louisiana, 134 U. S. 1. A corporation chartered by Congress cannot sue a State. Smith v. Reeves, 178 U. S. 436.

accurately determine the jurisdiction of the Federal courts in these cases has been a very difficult and delicate matter, and the questions which thus constantly arise are hard to answer. The fact that a State is not named as a party to the record does not of itself remove a case from the terms of the Eleventh Amendment.[5] Whether a State is an actual party in the sense of the prohibition must be determined by a consideration of the nature of the case as presented by the whole record.[6] The doctrine was laid down by Mr. Justice Miller as follows: "It may be accepted as a point of departure unquestioned, that neither a State nor the United States can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States, by virtue of the original jurisdiction conferred on this court by the Constitution. This principle is conceded in all the cases; and whenever it can be clearly seen that the State is an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction. But in the desire to do that justice which in many cases the courts can see will be defeated by an unwarranted extension of this principle, they have in some instances gone a long way in holding the State not to be a necessary party, though some interest of hers may be more or less affected by the decision. In many of these cases the action of the court has been based upon principles whose soundness cannot be disputed. A reference to a few of them may enlighten us in regard to the case now under consideration. 1. It has been held in a class of cases, where property of the State, or property in which the State has an interest, comes before the court and under its control, in the regular course of judicial administration, without being forcibly taken from the possession of the government, the court will proceed to discharge its duty in regard to that property, and the State, if it choose to come in as plaintiff, as in prize cases, or to intervene in other cases where she may have a lien or other claim on the property, will be

[5] Elliott v. Wiltz, 107 U. S. 711; Cunningham v. Macon & Brunswick R. Co., 109 U. S. 446; Hagood v. Southern, 117 U. S. 52; In re Ayers, 123 U. S. 443; Fitts v. McGhee, 172 U. S. 516.

[6] Poindexter v. Greenhow, 114 U. S. 270, 287; In re Ayers, 123 U. S. 443, 492; Fitts v. McGhee, 172 U. S. 516.

permitted to do so, but subject to the rule that her rights will receive the same consideration as any other party interested in the matter, and be subjected in like manner to the judgment of the court.[7] 2. Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is that he has acted under the orders of the government. In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he *asserts* authority as such officer. To make out his defense he must show that his authority was sufficient in law to protect him.[8] Accordingly, it has been held that a State officer who holds land in the name and for the uses of the State may be sued in ejectment,[9] and that, after a judgment in ejectment against him, another State officer cannot intervene and have the judgment opened upon an answer containing the same defense;[10] that a State officer may be sued in trespass for the seizure of personal property in obedience to an unconstitutional State statute;[11] that he may be enjoined from making such a seizure,[12] even when acting under the orders of the State court in a case of which the Federal court had prior jurisdiction;[13] from an infringement of copyright in the publication of an edition of the State statutes under express legislative authority;[14] from unlawfully revoking a license to transact business in the State issued to a foreign corporation;[15] but not from refusing to reissue an annual license to a foreign corporation unless it com-

[7] Cunningham v. Macon & Brunswick R. Co., 109 U. S. 446, 451, 452; citing on this point The Siren, 7 Wall. 152, 157; The Davis, 10 Wall. 15, 20; Clark v. Barnard, 108 U. S. 436.

[8] Cunningham v. Macon & Brunswick R. Co., 109 U. S. 446, 452; citing Mitchell v. Harmony, 13 How. 115; Bates v. Clark, 95 U. S. 204; Meigs v. McClung, 9 Cranch, 11; Wilcox v. Jackson, 13 Pet. 498; Brown v. Huger, 21 How. 305; Grisar v. McDowell, 6 Wall. 363; U. S. v. Lee, 106 U. S. 196; Virginia Coupon Cases, 114 U. S. 269.

[9] Spindal v. Wesley, 167 U. S. 204; *supra*, § 37. Such a suit was sustained when the defendant was sued as comptroller of the State. Saranac L. & T. Co. v. Roberts, 68 Fed. R. 521.

[10] Vance v. Wesley, 85 Fed. R. 157.

[11] Scott v. Donald, 165 U. S. 58; Virginia Coupon Cases, 114 U. S. 269; McGahey v. Virginia, 135 U. S. 662, 684. But not for damages under 26 St. at L. 209, for aiding the State in monopolizing interstate commerce. Lowenstein v. Evans, 69 Fed. R. 908.

[12] Scott v. Donald, 165 U. S. 107.

[13] In re Tyler, 149 U. S. 164.

[14] Howell v. Miller (C. C. A.), 91 Fed. R. 129.

[15] Met. Life Ins. Co. v. McNall, 81 Fed. R. 888.

plied with the terms of a statute which it claimed to be unconstitutional;[16] from levying an illegal tax under the authority of an unconstitutional statute;[17] and from enforcing an order of a railroad commission reducing the price of railroad freight in obedience to an act of the State legislature that was unconstitutional.[18]

"3. A third class, which has given rise to more controversy, is where the law has imposed upon an officer of the government a well-defined duty in regard to a specific matter, not affecting the general powers or functions of the government, but in the performance of which one or more individuals have a distinct interest capable of enforcement by judicial process. Of this class are writs of mandamus to public officers."[19] "But in all such cases, from the nature of the remedy of mandamus, the duty to be performed must be merely ministerial, and must involve no element of discretion to be exercised by the officer. It has, however, been much insisted on that in this class of cases, where it shall be found necessary to enforce the rights of the individual, a court of chancery may, by a mandatory decree or by an injunction, compel the performance of the appropriate duty, or enjoin the officer from doing that which is inconsistent with that duty and with plaintiff's rights in the premises. Perhaps the strongest assertion of this doctrine is found in the case of *Davis v. Gray*, 16 Wall. 203. In that case, the State of Texas, having made a grant of the alternate sections of land along which a railroad should thereafter be located, and the railroad company having surveyed the land at its own expense and located its road through it, the commissioner of the State land office and the governor of the State were, in violation of the rights of the company, selling and delivering patents for the sections to which the company had an undoubted vested right. The Circuit Court enjoined them from doing this by its decree, which was affirmed in this

[16] Manchester Fire Ins. Co. v. Herriott, 91 Fed. R. 711, 716.

[17] Osborne v. Bank of U. S., 9 Wheat. 738.

[18] Smyth v. Ames, 169 U. S. 466. See also Reagan v. Farmers' L. & Tr. Co., 154 U. S. 362; Dinsmore v. Southern Exp. Co., 92 Fed. R. 714.

[19] Cunningham v. Macon & B. R. Co., 109 U. S. 446, 452, 453; citing Marbury v. Madison, 1 Cranch, 137; Kendall v. Stokes, 3 How. 87; U. S. v. Schurz, 102 U. S. 378; U. S. v. Boutwell, 17 Wall. 604. See Rolston v. Missouri Fund Com'rs, 120 U. S. 390, 411.

court."[20] "But it is clear that enjoining the governor of the State in the performance of one of his executive functions, the case goes to the verge of sound doctrine, if not beyond it, and that the principle should be extended no further.[21] Nor was there in that case any affirmative relief granted by ordering the governor and land commissioner to perform any acts toward perfecting the title of the company. The case of *Board of Liquidation v. McComb*, 92 U. S. 531, is to the same effect. The board of liquidation was charged by the statute of Louisiana with certain duties in regard to issuing new bonds of the State in place of old ones which might be surrendered for exchange by the holders of the latter. The amount of new bonds to be issued was limited by a constitutional provision. McComb, the owner of some of the new bonds already issued, filed his bill to restrain the board from issuing that class of bonds in exchange for a class of indebtedness not included within the purview of the statute, on the ground that his own bonds would thereby be rendered less valuable. This court affirmed the decree of the circuit court enjoining the board from exceeding its power in taking up by the new issue a class of State indebtedness not within the provisions of the law on that subject. In the opinion in that case the language used by Mr. Justice Bradley well and truly thus expresses the rule and its limitations: 'The objections to proceeding against State officers by mandamus or injunction are, first, that it is in effect proceeding against the State itself; and, second, that it interferes with the official discretion vested in the officers. It is conceded that neither of these can be done. A State, without its consent, cannot be sued as an individual; and a court cannot substitute its own discretion for that of executive officers, in matters belonging to the proper jurisdiction of the latter. But it has been settled that where a plain official duty requiring no exercise of discretion is to be performed, and performance is refused, any person who will sustain a personal injury by such refusal may have a mandamus to compel per-

[20] Cunningham v. Macon & B. R. Co., 109 U. S. 446, 458. See also Pennoyer v. McConnaughy, 140 U. S. 1; s. c., 43 Fed. R. 196; s. c., 43 Fed. R. 839.

[21] Davis v. Gray, 16 Wall. 203, was followed and approved as to the point questioned here in Pennoyer v. McConnaughy, 140 U. S. 1; s. c., 43 Fed. R. 196; s. c., 43 Fed. R. 839. See also President, etc. of Yale College v. Sanger, 62 Fed. R. 177.

formance; and when such duty is threatened to be violated by some official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it.' It is believed that this is as far as the court has gone in granting relief in this class of cases. The case of *Osborne v. Bank of the United States*, 9 Wheat. 738, often referred to, was decided upon this principle, and goes no further; for, in that case, a preliminary injunction of the court forbidding a State officer from placing the money of the bank, which he had seized, in the treasury of the State, having been disregarded, the final decree corrected this violation of the injunction, by requiring the restoration of the money thus removed."[22] "On the other hand, in the cases of *Louisiana v. Jumel*, and *Elliott v. Wiltz*, 107 U. S. 711, decided at the last term, very ably argued and very fully considered, the court declined to go any further. In the first of these cases the owners of the new bonds issued by the board of liquidation mentioned in McComb's case, above cited, brought the bill in equity in the Circuit Court of the United States, to compel the auditor of the State and the treasurer of the State to pay, out of the treasury of the State, the overdue interest coupons on their bonds, and to enjoin them from paying any part of the taxes collected for that purpose for the ordinary expenses of the government. They at the same time applied to the State court for a writ of mandamus to the same officers, which suit was then removed into the Circuit Court of the United States. In this they asked that these officers be commanded to pay, out of the moneys in the treasury, the taxes which they maintained had been assessed for the purpose of paying the interest on their bonds, and to pay such sums as had already been diverted from that purpose to others by the officers of the government. The Circuit Court refused the relief asked in such case, and this court affirmed the judgment of that court."[23] "No injunction can be issued against the officers of a

[22] See also Pennoyer v. McConnaughy, 140 U. S. 1; s. c., 48 Fed. R. 196; s. c., 43 Fed. R. 339; McGahey v. Virginia, 135 U. S. 662, 684; Louisiana v. Jumel, 107 U. S. 711; Sanford v. Gregg, 58 Fed. R. 620; Met. Life Ins. Co. v. McNall, 81 Fed. R. 888; Howell v. Walker, 91 Fed. R. 127; Reagan v. F. L. & Tr. Co., 154 U. S. 362; Smyth v. Ames, 169 U. S. 466; Dinsmore v. Southern Exp. Co., 92 Fed. R. 714.

[23] Cunningham v. Macon & B. R. Co., 109 U. S. 446, 454, 455. See also

State to restrain or control the use of property already in the possession of the State when the suit is commenced; or to compel the State to perform its obligation; or where the State has otherwise such an interest as to be a necessary party."[24] "We think the foregoing cases mark, with reasonable precision, the limit of the power of the courts in cases affecting the rights of the State or Federal governments in suits to which they are not voluntary parties. In actions at law, of which mandamus is one, where an individual is sued, as for injuries to persons or property, real or personal, or in regard to a duty which he is personally bound to perform, the government does not stand behind him to defend him. If he has the authority of law to sustain him in what he has done, like any other defendant he must show it to the court and abide the result. In either case the State is not bound by the judgment of the court, and generally its rights remain unaffected. It is no answer for the defendant to say, I am an officer of the government and acted under its authority, unless he shows the sufficiency of that authority. Courts of equity proceed upon different principles in regard to parties."[25] "Two classes of cases have appeared in the decisions of this court, and it is in determining to which class a particular case belongs that differing views have been presented. The first class is where the suit is brought against the officers of the State, as representing the State's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts.[26] The other class is where a suit is brought against defendants who, claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State, or for compensation in damages,

Governor of Georgia v. Madrazo, 1 Pet. 124; Hagood v. Southern, 117 U. S. 52; North Carolina v. Temple, 134 U. S. 22; Louisiana ex rel. N. Y. G. & L. Co. v. Steele, 134 U. S. 230; Farmers' Nat. Bank v. Jones, 105 Fed. R. 459.

[24] Gray, J., in Belknap v. Schild, 161 U. S. 10, 18.

[25] Cunningham v. Macon & B. R. Co., 109 U. S. 446, 456. See Virginia Coupon Cases, 114 U. S. 269.

[26] Pennoyer v. McConnaughy, 140 U. S. 1, 9, 10, per Lamar, J.

or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial, . . . is not, within the meaning of the Eleventh Amendment, an action against the State."[27]

In accordance with these views, it was held that a suit in equity by a bondholder against the officers of a State and a railroad company whose bonds he held, to have a sale of mortgaged property to the Governor of Georgia, claiming to act in his official capacity, declared void upon the ground "that the governor was not authorized to bid in said property for the State, and the State had no constitutional power to make the purchase," could not be maintained;[28] that the Federal courts have no jurisdiction of a suit in equity against a railroad company and its officers to compel the payment to the complainant of the dividends declared upon shares of its stock standing in the name of a State and pledged by State officers to secure the payment of part of a State debt, nor for a receiver of such stock, nor for its sale;[29] nor a suit in equity against State officers praying that they be directed to redeem certain certificates of State indebtedness and accept the same in payment for taxes;[30] nor of a suit in equity to enforce against a State officer the execution of a trust vested by statute in the State or in such officer, designated by his official title.[31] A bill, the object of which is by injunction, indirectly, to compel the

[27] Pennoyer v. McConnaughy, 140 U. S. 1, 10.

[28] Cunningham v. Macon & B. R. Co., 109 U. S. 446. See, however, the dissenting opinion of Field and Harlan, JJ. But an action against a State treasurer to recover taxes illegally exacted is a suit against the State and cannot be maintained. Smith v. Reeves, 178 U. S. 436.

[29] Christian v. Atlantic & N. C. R. Co., 133 U. S. 233. But see Swasey v. N. C. R. Co., 1 Hughes, 17. It was held that the fact that a State owned all the stock of a railroad company did not prevent a suit against the corporation for specific performance of a contract by it, and for an injunction against the governor and State attorney-general from aiding in such violation. Judge Simonton said: "When the State entered into this enterprise with private persons, she did not carry into it her functions of sovereignty, but stripped herself of them." Southern Ry. Co. v. North Carolina R. Co., 81 Fed. R. 595, 599, 600.

[30] Hagood v. Southern, 117 U. S. 52. But see Rolston v. Chittenden, 120 U. S. 390.

[31] Brown University v. Rhode Island College, 56 Fed. R. 55.

specific performance of a contract by a State by forbidding all those acts and doings which constitute breaches of the contract, is a suit against the State.[32] Such is a suit to enjoin the State, governor, attorney-general, auditor, commonwealth attorneys, State and county prosecuting officers from bringing suits in the name of that State and in its courts to enforce a State statute,[33] and a suit to enjoin criminal proceedings in a State court;[34] at least where the State officers are acting under a statute the validity of which was admitted, and were not threatening to institute litigation in pursuance of the express direction of an unconstitutional act of the legislature.[35] A State cannot, without its consent, be sued by one of its own citizens, even on a cause of action arising under the Constitution and laws of the United States.[36] It has been held that a State is not a necessary party to a suit by the United States to cancel a contract between it and a private individual for the sale of lands, obtained by the State from the plaintiff by mistake or fraud.[37] A county is subject to suit in a court of the United States; and a State law cannot divest a Federal court of jurisdiction over such a suit.[38] But where a State statute authorized suits against the State only in a State court, it was held that the Federal courts had no jurisdiction.[39] It has been held at Circuit that a cross-bill may be filed against a State which has brought an original bill;[40] and that, after a removal of a suit brought by a State, an injunction may be granted to stay further proceedings in the State court therein.[41]

§ 38. Liability of a State to a suit by another State.— The Constitution provides that "the judicial power shall extend . . . to controversies between two or more States; . . . and between a State, or the citizens thereof, and foreign States,

[32] In re Ayers, 123 U. S. 443, 502, per Matthews, J.

[33] In re Ayers, 123 U. S. 443; Fitts v. McGhee, 172 U. S. 516; Harkrader v. Wadley, 172 U. S. 148; Ball v. Rutland R. Co., 93 Fed. R. 518. But see Smyth v. Ames, 169 U. S. 466; Reagan v. Farmers' L. & T. Co., 154 U. S. 362.

[34] Fitts v. McGhee, 172 U. S. 516; Harkrader v. Wadley, 172 U. S. 148.

[35] See Smyth v. Ames, 169 U. S. 466; Reagan v. Farmers' L. & T. Co., 154 U. S. 362; W. U. Tel. Co. v. Wyatt, 98 Fed. R. 335.

[36] Hans v. Louisiana, 134 U. S. 1; North Carolina v. Temple, 134 U. S. 22.

[37] Williams v. U. S., 138 U. S. 514, 516.

[38] Lincoln County v. Luning, 133 U. S. 529.

[39] Smith v. Reeves, 178 U. S. 436.

[40] Port Royal & A. Ry. Co. v. South Carolina, 60 Fed. R. 552.

[41] Abeel v. Culberson, 55 Fed. R. 329. See *infra*, §§ 211, 223, 391.

citizens or subjects."[1] The Eleventh Amendment has not taken away the liability of one of the United States to a suit by another such State or a foreign State. Such jurisdiction, however, is confined to controversies concerning rights affecting property; not to those merely affecting political rights.[2] It includes controversies concerning boundaries between different States, even though the complainant claim no title other than that of sovereignty and jurisdiction over the lands in question.[3] For, "in this country, where feudal tenures are abolished, in cases of escheat the State takes the place of the feudal lord, by virtue of its sovereignty, as the original and ultimate proprietor of all the lands within its jurisdiction."[4] If, however, in a bill which prays relief against a threatened invasion of rights purely political in their nature, a threatened injury to property be stated "only by way of showing one of the grievances resulting from the threatened destruction of the State, and in aggravation of it, not as a specific ground of relief;" and "this matter of property is neither stated as an independent ground, nor is it noticed at all in the prayers for relief," the bill will be dismissed.[5] A suit cannot be maintained when brought by one State against another to enforce the payment by the latter of its bonds originally held by citizens of the former State, and assigned by them to it solely for the purpose of collection,[6] nor to prevent the enforcement of quarantine regulations which impose unreasonable restraint upon the commerce between parts of the two States.[7] A tribe of Indians domiciled within the borders of the United States does not constitute a foreign State within the meaning of the Constitution.[8]

§ 39. Suits against infants.— An infant when sued should be provided by the court with a guardian *ad litem*.[1] For an

§ 38. [1] Art. III, § 2.

[2] Cherokee Nation v. Georgia, 5 Pet. 1; Georgia v. Stanton, 6 Wall. 50; Georgia v. Grant, 6 Wall. 241.

[3] Rhode Island v. Massachusetts, 12 Pet. 657; Missouri v. Iowa, 7 How. 660; Florida v. Georgia, 17 How. 478; Alabama v. Georgia, 23 How. 505; Virginia v. West Virginia, 11 Wall. 39.

[4] Georgia v. Stanton, 6 Wall. 50, 73.

[5] Georgia v. Stanton, 6 Wall. 50, 77.

[6] New Hampshire v. Louisiana, 108 U. S. 76.

[7] Louisiana v. Texas, 176 U. S. 1. But see Missouri v. Illinois, 180 U. S., *supra*, § 14.

[8] Cherokee Nation v. Georgia, 5 Pet. 1.

§ 39. [1] Rule 87; Bank of U. S. v. Ritchie, 8 Pet. 128, 144. See Woolridge v. McKenna, 8 Fed. R. 650, 670.

omission to appoint a guardian *ad litem*, a decree against an infant will be reversed upon appeal.[2] An application for the appointment of a guardian *ad litem* for an infant should be made by petition, which, if the appointment of a particular person is desired, should state his name and his consent to act as such.[3] The court will usually appoint the infant's general guardian or "the nearest relative not concerned, in point of interest, in the matter in question;"[4] but the choice of the guardian rests in the sound discretion of the court, and only in an extraordinary case would a decree be reversed for an error in this respect.[5] The interests of an infant are guarded jealously by the court, which will not hold him bound by any admission made by him or in his behalf, whether in the pleadings[6] or otherwise;[7] but a decree by consent as the result of a compromise approved by the court may be made without a reference to a master,[8] although the safer practice is to have it referred. The guardian *ad litem* is responsible for the propriety of the defense.[9] He must pay costs for scandal;[10] and he may be removed by the court at any time.[11] This may be done if he is unable or unwilling to pay the expenses of the defense.[12] If no person of substance is willing to serve for the infants, the court "might suspend further proceedings until it could send a next friend or guardian *ad litem* to the State courts having jurisdiction of their person and property, to secure such guardianship as would protect them."[13] Infants may defend *in forma pauperis;* but, except in very extraordinary circumstances, their expenses will not be advanced out of a fund in

[2] O'Hara v. MacConnell, 93 U. S. 150.

[3] Rhinelander v. Sanford, 3 Day (U. S. C. C. D. Conn.), 279.

[4] Bank of U. S. v. Ritchie, 8 Pet. 128, 144; Story's Eq. Pl., § 70; Calvert on Parties, Book III, ch. xxxi.

[5] Bank of U. S. v. Ritchie, 8 Pet. 128, 144. See Kingsbury v. Buckner, 134 U. S. 650.

[6] Bank of U. S. v. Ritchie, 8 Pet. 128, 144, 145; Walton v. Coulson, 1 McLean, 125; s. c., Coulson v. Walton, 9 Pet. 62, 84; Hawkins v. Luscombe, 2 Swanst. 375, 390; Savage v. Carroll, 1 Ball & B. 553.

[7] Legard v. Sheffield, 2 Atk. 377; White v. Miller, 158 U. S. 128. See also Kingsbury v. Buckner, 134 U. S. 650; Clarke v. Clarke, 178 U. S. 186.

[8] Thompson v. Maxwell L. G. & Ry. Co., 168 U. S. 451.

[9] Knickerbacker v. De Freest, 2 Paige (N. Y.), 304.

[10] Daniell's Ch. Pr. (2d Am. ed.) 204.

[11] Russell v. Sharpe, 1 Jac. & W. 483.

[12] Ferguson v. Dent, 15 Fed. R. 771, 772.

[13] Ferguson v. Dent, 15 Fed. R. 771, 772.

the hands of a receiver.[14] A guardian *ad litem* may recoup his expenses from the infant's property.[15] According to the English practice, an appearance could be entered for an infant before a guardian *ad litem* had been appointed.[16] It is the safer practice in this country to serve the infant with a subpœna before the appointment of a guardian *ad litem;*[17] but where a guardian *ad litem* has been appointed, it will be presumed, in the absence of evidence to the contrary, that the infant was duly served.[18] A decree against an infant is void unless he has been personally served with process, although a general guardian has appeared for him,[19] except in cases mentioned in section 738 of the Revised Statutes.[20]

§ 40. Suits against idiots, lunatics, and persons of weak mind.— Idiots and lunatics defend by guardians *ad litem*, appointed for them by the court.[1] A committee will usually be appointed guardian *ad litem* of the person in his charge,[2] unless his interest be opposed to that of the idiot or lunatic,[3] or perhaps if he refuse to answer or defend.[4] The guardian *ad litem* is usually joined with the idiot or lunatic as co-defendant.[5] It was held by Chancellor Kent, that in New York the committee appointed in accordance with statute, and not the idiot or lunatic, is the proper party to the bill;[6] but the rule in the Federal courts seems to be otherwise.[7] "A person reduced by age or infirmity to a second infancy may defend by guardian."[8] It is said that the answer of a superannuated person, put in by guardian, may be read against him as an answer of one of full age put in in person; and that the difference in this respect between such answer and that of an infant put in by guardian is,

[14] Ferguson v. Dent, 15 Fed. R. 771.

[15] Ferguson v. Dent, 15 Fed. R. 771, 772.

[16] Braithwaite's Pr. 322.

[17] Smith v. Reid, 134 N. Y. 568; Settlemier v. Sullivan, 97 U. S. 444; *infra*, § 94.

[18] Sloane v. Martin, 77 Hun (N. Y.), 249; *infra*, § 94.

[19] N. Y. Life Ins. Co. v. Bangs, 103 U. S. 435.

[20] *Infra*, § 97.

§ 40. [1] Rule 87; Harrison v. Rowan, 4 Wash. C. C. 202, 207.

[2] Story's Eq. Pl., § 70; Westcomb v. Westcomb, 1 Dick. 233; Harrison v. Rowan, 4 Wash. C. C. 202, 207.

[3] Snell v. Hyat, 1 Dick. 287; Story's Eq. Pl., § 70.

[4] Lloyd v. ——, 2 Dick. 460.

[5] Harrison v. Rowan, 4 Wash. C. C. 202.

[6] Brasher's Ex'rs v. Van Cortlandt, 2 Johns. Ch. (N. Y.) 242.

[7] Harrison v. Rowan, 4 Wash. C. C. 202, 207.

[8] Markle v. Markle, 4 J. Ch. 168.

because an infant improves and mends, and therefore is to have a day to show cause after he comes of age; but the other grows worse, and is to have no day.[9]

§ 41. Suits against married women.— In suits against a married woman by a third person, her husband, if not civilly dead or permanently absent from the State, should be joined with her as a co-defendant;[1] except perhaps in States where she has the same rights and liabilities as a spinster,[2] or when she is sued in a representative capacity.[3] She may, however, answer separately from her husband.[4] A bill filed in the name of a married woman suing alone, may be amended by the addition of a next friend, when necessary.[5]

[9] Daniell's Ch. Pr. (2d Am. ed.) 224, 225; citing Leving v. Caverly, Prec. Ch. 229.

§ 41. [1] Story's Eq. Pl., § 71; Calvert on Parties, Book III, ch. xxx; Hulme v. Tenant, 1 Brown, Ch. C. 16; Taylor v. Holmes, 14 Fed. R. 498, 514.

[2] Lorillard v. Standard Oil Co., 2 Fed. R. 902. But see Taylor v. Holmes, 14 Fed. R. 499, 514; Douglas v. Butler, 6 Fed. R. 228; U. S. v. Pratt Coal & Coke Co., 18 Fed. R. 708; O'Hara v. MacConnell, 93 U. S. 150.

[3] Moore v. Meynell, 2 Vern. 614, note.

[4] Duke of Chandos v. Talbot, 2 P. Wms. 372.

[5] Douglas v. Butler, 6 Fed. R. 228.

CHAPTER III.

PARTIES.

§ 42. General rule as to parties.—In ordinary cases, all persons should be made parties to a suit in equity, who are directly interested in obtaining or resisting the relief prayed for in the bill or granted in the decree.[1] If interested in obtaining the relief prayed for, they should join as plaintiffs; unless some refuse to appear in that capacity, when the rest should make them defendants.[2] This rule has been also stated by the expressions: that "all persons interested in the subject of the suit should be before the court;"[3] and that "all persons who have in the object or objects of the suit an interest or interests apparent upon the record, are necessary parties."[4]

"In determining who are proper parties to a suit, courts of equity are guided by two leading principles. One of them is a principle admitted in all courts of justice in this country, upon questions affecting liberty, or life, or property; namely, that no proceedings shall take place with respect to the rights of any one, except in his presence. Thus a decree of a court of equity binds no one who is not to be regarded, according to the rules of the court, either as a party, or else as one who claims under a party, to the suit. The second is a principle which in this country is peculiar to courts of equity; namely, that when a decision is made, it shall provide for all the rights which different persons have in the matters decided. For a court of equity in all cases delights to do complete justice, and not by halves;[5] to put an end to litigation, and to give decrees of such a nature that the performance of them may be perfectly safe to all who obey them: *interest reipublicæ ut sit finis*

§ 42. [1] Calvert on Parties, Book I, ch. i, and cases there cited.

[2] Harding v. Handy, 11 Wheat. 103; Wisner v. Barnet, 4 Wash. C. C. 631, 642; Fallows v. Williamson, 11 Ves. 313; Calvert on Parties, Book I, ch. viii. But see Hicklin v. Marco, 56 Fed. R. 549. For the rule in patent cases, see *infra*, § 44.

[3] Sir William Grant in Wilkins v. Fry, 1 Mer. 244, 262.

[4] Calvert on Parties (2d ed.), p. 13, and cases there cited.

[5] Knight v. Knight, 3 P. Wms. 333.

litium. In this respect there is a manifest distinction between the practice of a court of law and that of a court of equity. A court of law decides some one individual question which is brought before it; a court of equity not merely makes a decision to that extent, but also arranges all the rights which the decision immediately affects."[6] Thus, when a person who is charged with the payment of a sum of money is surety to another, the principal must be joined as defendant to the bill; as in the case of a suit against an heir for the performance of a covenant by his ancestor which binds him as well as the ancestor's personal estate, when the personal representative must also be joined. For "the court of equity in all cases delights to do complete justice, and not by halves: as, first, to decree the heir to perform this covenant, and then to put the heir upon another bill against the executor to reimburse himself out of the personal assets, which, for aught appears to the contrary, may be more than sufficient to answer the covenant; and when the executor and heir are both brought before the court, complete justice may be done by decreeing the executor to perform this covenant as far as the personal assets will extend, the rest to be made good by the heir out of the real assets. And here appears no difficulty or inconvenience in bringing the executor before the court. On the contrary, it would prevent a multiplicity of suits, which a court of equity ought to do."[7]

§ 43. Parties with no interest in the subject-matter of the suit.— Although as a general rule no person can be made a party against whom, if brought to a hearing, the plaintiff can have no decree,[1] yet the English practice allowed strangers in certain cases to be made parties for the sake of discovery, and even in order to mulct them with costs. In a suit against a corporation, its officers, book-keeper, or members might be made parties for the sake of discovery concerning matters which had come to their knowledge while transacting the business of the corporation;[2] but not, it seems, to obtain discovery

[6] Calvert on Parties (2d ed.), pp. 2, 3.

[7] Lord Chancellor Talbot in Knight v. Knight, 3 P. Wms. 331, 334.

§ 43. [1] Wych v. Meal, 3 P. Wms. 310, 311, note; Dan. Ch. Pr. (2d Am. ed.) 342.

[2] Wych v. Meal, 3 P. Wms. 310; Anon., 1 Vern. 117; Fenton v. Hughes, 7 Ves. 289; Glyn v. Soares, 1 Y. & C. 644; Many v. Beekman Iron Co., 9 Paige (N. Y.), 189; Doyle v. San Diego L. & Tr. Co., 43 Fed. R. 349; Virginia & A. Min. & Mfg. Co. v. Hale (Cal.), 9 S. R. 256; Continental Nat. Bank v.

of such as they knew only through their participation in its formation.[3] It is held in the Federal courts that when an answer under oath is waived, it is improper to make the officers of a corporation parties to a suit against it, if no relief is asked against them; and a demurrer by them to such a bill making them parties defendant will be sustained.[4] Agents to sell, auctioneers, arbitrators, and attorneys could formerly be made defendants for a similar purpose in suits against their principals concerning transactions with which they were connected,[5] but not where their principals were pecuniarily responsible.[6] And in a few cases of fraud it has been held that persons implicated in the fraud might be made parties merely to make them liable for costs.[7]

§ 44. Persons who on account of their interest need not be made parties to a suit in equity.—No persons should be joined as parties to a suit in equity, either as co-plaintiffs or co-defendants, who are not directly interested in obtaining or resisting the relief prayed for in the bill,[1] nor who claim the property in question under inconsistent titles.[2] Thus, prior incumbrancers should not be made parties to a bill for the foreclosure of a mortgage,[3] unless it prays for a receiver,[4] or seeks

Heilman, 66 Fed. R. 184; Consolidated Brake-Shoe Co. v. Chicago, P. & St. L. Ry. Co., 69 Fed. R. 412; Calvert on Parties (2d ed.), 92-94. But see Boston W. H. Co. v. Star R. Co., 40 Fed. R. 167; Cleveland F. & B. Co. v. U. S. Rolling S. Co., 41 Fed. R. 476.

[3] McComb v. Chicago, St. L. & N. O. R. Co., 7 Fed. R. 426.

[4] Colonial & U. S. Mtg. Co., Ld., v. Hutchinson Mtg. Co., 44 Fed. R. 219; Matthews & W. Mfg. Co. v. Trenton L. Co., 73 Fed. R. 212. See Boston W. H. Co. v. Star Rubber Co., 40 Fed. R. 167.

[5] Fenton v. Hughes, 7 Ves. 288, 289; Dummer v. Corporation of Chippenham, 14 Ves. 252; Bowles v. Stewart, 1 Scho. & Lefr. 209; Brady v. McCorker, 1 N. Y. 214; s. c., 1 Barb. Ch. 343.

[6] Seiferd v. Mulligan, 86 App. Div. (N. Y.) 83; Bowles v. Stewart, 1 Scho. & Lef. 209.

[7] Taylour v. Rochford, 2 Ves. Sen. 281; Smith v. Green, 87 Fed. R. 424; Huggins v. King, 3 Barb. (N. Y.) 617; Hammond v. Hudson R. L. & N. Co., 20 Barb. (N. Y.) 386; Pritchard v. Palmer, 88 Hun, 412; Calvert on Parties (2d ed.), 96, and cases cited. See Ewin v. Oregon Ry. & Nav. Co., 27 Fed. R. 625.

§ 44. [1] Calvert on Parties (2d ed.), 6; Mare v. Malachy, 1 M. & C. 559.

[2] Calvert on Parties (2d ed.), 105; Marquis Cholmondely v. Lord Clinton, 2 Jac. & W. 188; Saumarez v. Saumarez, 4 M. & C. 331; Dial v. Reynolds, 96 U. S. 340; *infra*, § 73.

[3] Hagan v. Walker, 14 How. 29, 37; Jerome v. McCarter, 94 U. S. 734; Nalle v. Young, 160 U. S. 624.

[4] Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 306.

to obtain a sale of the entire mortgaged property free from all liens,[5] or unless "there is substantial doubt respecting the amount of debts due prior lien creditors," in which case "there is obvious propriety in making them parties, that the amount of the charge remaining on the land after the sale may be determined, and that purchasers at the sale may be advised of what they are purchasing;"[6] or unless there are other peculiar circumstances making it necessary. Nor need a mortgagor who has sold his equity of redemption,[7] nor a guarantor of the mortgage, even if he has paid interest,[8] be made a party to a foreclosure, unless relief is sought against him.[9] When, however, such relief is sought against the mortgagor or a grantee of the equity of redemption who has assumed payment of the mortgage, all grantees who have made such an assumption should ordinarily be joined as defendants in order that their respective rights may be determined.[10] Lessees are not necessary, although they are proper parties to a suit to foreclose a mortgage prior to their leases,[11] or to foreclose a vendor's lien.[12] In a suit by the holders of bonds secured by a trust mortgage to recover damages from the trustee for his negligent administration of the trust, the mortgagor need not be made a party, but it has been held that the bill must be filed on behalf of all

[5] Hagan v. Walker, 44 How. 29; Jerome v. McCarter, 94 U. S. 734, 735; McClure v. Adams, 76 Fed. R. 899.

[6] Strong, J., in Jerome v. McCarter, 94 U. S. 734, 735, 736.

[7] Kanawha Coal Co. v. Kanawha & O. C. Co., 7 Blatch. 391, 416; Grove v. Grove, 91 Fed. R. 865. But see Matcalm v. Smith, 6 McLean, 416. As to receivers, *infra*, § 45.

[8] Columbia F. & Trust Co. v. Kentucky U. Ry. Co., 60 Fed. R. 794.

[9] Ayers v. Wisawall, 112 U. S. 187.

[10] Skinner v. Harker, 28 Colo. 333; s. c., 48 Pac. R. 648. But see Kelly v. Ashford, 138 U. S. 610, 626; *infra*, § 53.

[11] Tyler v. Hamilton, 62 Fed. R. 187. It has been held that tenants under leases by a railway company, subject to mortgages of the property, are not necessary parties to a foreclosure suit, and that their rights are therefore extinguished by the foreclosure sale (Ibid.), and that neither the first mortgagee, the mortgagor, nor any lessor, is a necessary party to the foreclosure of a second railroad mortgage covering leased lines, but not affecting the rights of the lessors, when all the property is in the hands of the receivers. Grand Trunk Ry. Co. v. Central Vt. R. Co., 88 Fed. R. 622.

[12] Brisco v. Minah Consol. Min. Co., 82 Fed. R. 952. It was held in Mississippi, where a mortgagor had conveyed land to the children of his mortgagee, that the latter were not necessary parties to a suit by the mortgagor against the mortgagee for an injunction and an accounting. Lipscomb v. Jack (Miss., 1896), 20 S. R. 883.

the bondholders and not merely on behalf of those who are joined as complainants.[13]

So, in suits for specific performance, it is a general rule that none are necessary parties but parties to the contract, or their representatives,[14] including in a proper case their heirs[15] and devisees;[16] unless there are other persons with such an interest in the contract or the property agreed to be sold that concurrence is necessary to the completion of the title, or that their rights would be prejudiced were a decree made in their absence.[17]

Nor need the assignor of the whole interest in a thing in action be made a party to a suit by the assignee;[18] except in the case of a suit by the equitable assignee of a patent,[19] or copyright,[20] or trade-mark,[21] or by the licensee,[22] or mortgagor

[13] Frishmuth v. Farmers' L. & T. Co., 95 Fed. R. 5.

[14] Tasker v. Small, 3 M. & C. 63, 68; Calvert on Parties (2d ed.), Book III, ch. xvii.

[15] Morgan's Heirs v. Morgan, 2 Wheat. 290.

[16] Buck v. Buck, 11 Paige (N. Y.), 170.

[17] Jones v. Lewis, 1 Cox Eq. 199; Evans v. Jackson, 8 Sim. 217; Calvert on Parties, Book III, ch. xvii.

Where the contract is made by an agent in his own name he is a necessary party to a suit by his principal for specific performance. Pennsylvania & N. J. R. Co. v. Byerson, 36 N. J. Eq. 112, 116. It has been held that in such a case he can sue without joining his principal although defendant knew that he acted as an agent only. Kelley v. Tracy, 102 Mo. 522.

[18] Harris v. Johnston, 3 Cranch, 311; Boon v. Chiles, 8 Pet. 532; Robertson v. Carson, 19 Wall. 94; s. c., Chase's Dec. 475; Batesville Institute v. Kauffman, 18 Wall. 151; Fulham v. McCarthy, 1 H. L. C. 703.

[19] Stimpson v. Rogers, 4 Blatchf. 333; North v. Kershaw, 4 Blatchf. 70; Patterson v. Stapler, 7 Fed. R. 210; Goodyear v. Allen, 3 Fisher, 284.

[20] Colburn v. Duncombe, 9 Sim. 151; Chappell v. Purday, 4 Y. & C. 485; Calvert on Parties (2d ed.), 315.

[21] Krauss v. Jos. R. Peebles Sons Co., 58 Fed. R. 585.

[22] Waterman v. Mackenzie, 138 U. S. 252, 255, 256, 260, 261, per Gray, J.: "The patentee or his assigns may, by instrument in writing, assign, grant and convey either, first, the whole patent, comprising the exclusive right to make, use and vend the invention throughout the United States; or, second, an undivided part or share of that exclusive right; or, third, the exclusive right under the patent within and throughout a specified part of the United States. R. S., § 4898. A transfer of either of these three kinds of interests is an assignment, properly speaking, and vests in the assignee a title in so much of the patent itself, with a right to sue infringers; in the second case, jointly with the assignor; in the first and third cases, in the name of the assignee alone. Any assignment or transfer, short of one of these, is a mere license, giving the licensee no title in the patent, and no right to sue at law in his own name for an infringement. R. S., § 4919; Gayler v. Wilder, 10 How.

by a mortgage duly recorded at Washington,[23] or by an assignee under an assignment still executory,[24] or by an assignee,

477, 494, 495; Moore v. Marsh, 7 Wall. 515. In equity, as at law, when the transfer amounts to a license only, the title remains in the owner of the patent; and suit must be brought in his name, and never in the name of the licensee alone, unless that is necessary to prevent an absolute failure of justice, as where the patentee is the infringer, and cannot sue himself." Adriance, P. & Co. v. McCormick H. M. Co. (C. C. A.), 56 Fed. R. 918; Littlefield v. Perry, 21 Wall. 205. "Any rights of the licensee must be enforced through or in the name of the owner of the patent, and perhaps, if necessary, to protect the rights of all parties, joining the licensee with him as a plaintiff. R. S., § 4921; Littlefield v. Perry, 21 Wall. 205, 223; Paper Bag Cases, 105 U. S. 766–771; Birdsell v. Shaliol, 112 U. S. 485–487. And see Renard v. Levinstein, 2 Hem. & Mil. 628. Whether a transfer of a particular right or interest under a patent is an assignment or a license does not depend upon the name by which it calls itself, but upon the legal effect of its provisions. For instance, a grant of an exclusive right to make, use and vend two patented machines within a certain district is an assignment, and gives the grantee the right to sue in his own name for an infringement within the district, because the right, although limited to making, using and vending two machines, excludes all other persons, even the patentee, from making, using or vending like machines within the district. Wilson v. Rousseau, 4 How. 646, 686. On the other hand, the grant of an exclusive right under the patent within a certain district, which does not include the right to make, and the right to use, and the right to sell, is not a grant of a title in the whole patent-right within the district, and is therefore only a license. Such, for instance, is a grant of 'the full and exclusive right to make and vend' within a certain district, reserving to the grantor the right to make within the district to be sold outside of it. Gayler v. Wilder, above cited. So is a grant of 'the exclusive right to make and use,' but not to sell, patented machines within a certain district. Mitchell v. Hawley, 16 Wall. 544. So is an instrument granting 'the sole right and privilege of manufacturing and selling' patented articles, and not expressly authorizing their use, because, though this might carry by implication the right to use articles made under the patent by the licensee, it certainly would not authorize him to use such articles made by others. Hayward v. Andrews, 106 U. S. 672. See also Oliver v. Rumford Chemical Works, 109 U. S. 75. A patent-right is incorporeal property, not susceptible of actual delivery or possession; and the recording of a mortgage thereof in the Patent Office, in accordance with the act of Congress, is equivalent to a delivery of possession, and makes the title of the mortgagee complete towards all other persons, as well as against the mortgagor. . . . The necessary conclusion appears to us to be that Shipman, being the present owner of the whole title in the patent under a mortgage duly executed and recorded, was the person, and the only person, entitled to maintain such a bill as this, and that the plea, therefore, was rightly adjudged good."

[23] Ibid.

[24] Land Co. of New Mexico v. Elkins, 20 Fed. R. 545.

such as a pledgee, whose assignor has an equitable interest in the property,[25] when it is the safer practice to join, as plaintiff or defendant, the assignor, licensor or mortgagee, as the case may be. The exclusive licensee of a patent for a specified territory has the implied authority, even against the will of the owner, to join him as a co-complainant in a bill to enjoin an infringement.[26] The patentee and his exclusive licensee may join in a suit to enjoin the infringement of a patent,[27] but the patentee and a licensee whose license is not exclusive cannot.[28] Such a licensee is ordinarily not a proper party plaintiff.[29] An exclusive licensee need not ordinarily be joined as a complainant with the patentee.[30] The assignee of the whole of a patent, so far as a particular territory is concerned, need not be made a party to a suit by the assignor to enjoin infringements elsewhere.[31]

It has been held at Circuit that a tax collector is not a proper party to a bill to set aside a conveyance made by him.[32] And, as has been said before, no persons should be joined as plaintiffs,[33] or defendants,[34] who claim the property in question under inconsistent titles. For example, a mortgagee cannot maintain a bill against the mortgagor for a foreclosure, which at

[25] Hubbard v. Manhattan Trust Co. (C. C. A.), 87 Fed. R. 51, 57; Western Nat. Bank v. Armstrong, 152 U. S. 346; Ackerson v. Long Branch & L. Co., 28 N. J. Eq. 542.

[26] Brush-Swan El. L. Co. v. Thomson-Houston El. Co., 48 Fed. R. 224; Brush El. Co. v. El. Imp. Co., 49 Fed. R. 73; Brush El. Co. v. California El. L. Co. (C. C. A.), 52 Fed. R. 945; Excelsior W. P. Co. v. Allen (C. C. A.), 104 Fed. R. 553. It was held in Van Orden v. Nashville, 67 Fed. R. 331, that the part owner of a patent cannot sue at law for damages caused by an infringement without joining his fellow-owners as co-plaintiffs, and that he cannot make them defendants when they refuse to sue.

[27] Ibid.

[28] Blair v. Lippincott Gl. Co., 52 Fed. R. 226.

[29] Ibid.

[30] Union S. & S. Co. v. Johnson R. R. Signal Co., 52 Fed. R. 867; Gayler v. Wilder, 10 How. 477. "In the case of Waterman v. MacKenzie, 138 U. S. 252, 11 Supr. Ct. R. 334, the Supreme Court held that a licensee might sue in his own name when it was necessary to prevent an absolute failure of justice. This is the effect, I take it, of the language of the court there used." Knowles, D. J., in Brush El. Co. v. California E. L. Co. (C. C. A.), 52 Fed. R. 945, 961.

[31] Canton S. R. Co. v. Kanneberg, 51 Fed. R. 599, 600.

[32] West v. Duncan, 42 Fed. R. 480.

[33] Marquis Cholmondeley v. Lord Clinton, 2 Jac. & W. 1, at p. 135; Saumarez v. Saumarez, 4 M. & C. 331, 336. See Parsons v. Lyman, 4 Blatchf. C. C. 432; *infra*, § 73.

[34] Dial v. Reynolds, 96 U. S. 340; *infra*, § 73.

the same time seeks to enjoin a claimant adverse to both mortgagor and mortgagee from asserting his title to the mortgaged property.[35] An interest in the question of law involved is not sufficient to make a person a necessary or even a proper party,[36] except when a bill of peace is filed. The equity rules, following the English orders in chancery, also provide that "in all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable."[37] This rule, however, only applies when the demand is both joint and several, not when it is merely joint;[38] and when one of two or more jointly and severally indebted is the principal debtor, to whom the others are sureties, he must, it seems, always be joined in a bill filed by the creditor to enforce a security against either of the latter.[39] Concerning the chancery order from which Rule 51 was copied, Vice-Chancellor Shadwell said that it "applied to cases where several persons were liable in different characters,— that is, some as principals and the rest as sureties; and then it was sufficient to make one individual of each class a party; but where there was only one principal and one surety, both of them must be made parties."[40]

§ 45. Cases where the law has furnished a representative. On account of the inconvenience which would be caused if the general rule were enforced in all cases, there are several classes of exceptions to it.[1] The first of these exists when the law has furnished a representative of the interest in question. In such a case, those whom he represents are not usually necessary parties to the suit.[2] Thus, until they have distributed the decedent's estate,[3] executors and administrators are deemed suffi-

[35] Ibid. But see Hefner v. Northwestern Life Ins. Co., 123 U. S. 747.

[36] Vallette v. Whitewater Valley Canal Co., 4 McLean, 192.

[37] Rule 51, copied from the 82d Order in Chancery of August, 1841.

[38] Pierson v. Robinson, 3 Swanst. 139, n.

[39] Robertson v. Carson, 19 Wall. 94; Wilson v. City Bank, 3 Sumn. 423; Allen v. Houlden, 6 Beav. 148; Pinkus v. Peters, 5 Beav. 253.

[40] Lloyd v. Smith, 13 Sim. 457, 458, 459.

§ 45. [1] Wallworth v. Holt, 4 M. & C. 619; Powell v. Wright, 7 Beav. 449.

[2] Calvert on Parties (2d ed.), 22. See Hopkins v. Page, 2 Brock. 20, 42.

[3] Carey v. Roosevelt, 81 Fed. R. 606.

ciently to represent all legatees, creditors and next of kin in suits brought by or against them in their representative capacity,[4] except when they are made defendants to a suit by a residuary legatee for his share of the estate,[5] or when the rights of the legatees or next of kin between one another are in question,[6] or where they are sued for collusion with a legatee who should then be made a party,[7] or, perhaps, when an executor or administrator is charged with a breach of trust and an accounting is required; but the executors do not represent the heirs at law in a suit affecting the real estate,[8] and the devisees were held to be indispensable parties to a suit to foreclose a mortgage made by an executor.[9] It has been held that where a suit is brought to determine the ownership of a fund in the hands of the trustee of an intestate, an administrator of the decedent's estate must first be appointed, and it is error to decree that the fund be paid "to such person as may hereafter be appointed administrator."[10] So a bankrupt or insolvent debtor[11] and his creditors[12] are not usually necessary parties to a suit brought by or against his assignee. It has been held improper for a creditor of an estate to join with its receiver in a suit concerning it.[13]

A corporation need not be, although it usually is, joined as a co-defendant to a suit against its receiver to foreclose a lien upon its property where no personal relief is sought against it.[14] It has been held that the Comptroller of the Currency and the

[4] Brown v. Dowthwaite, 1 Madd. 448; Potter v. Gardner, 12 Wheat. 499; Burton v. Smith, 4 Wash. C. C. 522; Dandridge v. Washington's Ex'rs, 2 Pet. 370, 377; Wainwright v. Waterman, 1 Ves. Jr. 313; Anon., 12 Mod. 522; Glover v. Patten, 165 U. S. 394.

[5] Atwood v. Hawkins, Rep. temp. Finch, 113; Faithful v. Hunt, 3 Anst. 751; Calvert on Parties (2d ed.), 206, 208. But see McArthur v. Scott, 113 U. S. 340, 345; Martin v. Fort, 83 Fed. R. 19.

[6] Kendall v. Hardenbergh, 94 Fed. R. 911.

[7] Attorney-General v. Wynne, Mos. 126.

[8] Wooslin v. Cooper (N. J. Ch., 1897), 36 Atl. R. 281. But see Alger v. Anderson, 78 Fed. R. 729, 733.

[9] Detweiler v. Holderbaum, 42 Fed. R. 337.

[10] Read v. Bennett (N. J. Errors & Appeals, 1897), 37 Atl. R. 75; *infra*, § 58.

[11] De Wolf v. Johnson, 10 Wheat. 367, 384; Van Reimsdyk v. Kane, 1 Gall. 371; Calvert on Parties (2d ed.), 24.

[12] Spragg v. Binkes, 5 Ves. 587.

[13] Doggett v. Railroad Co., 99 U. S. 72.

[14] Central Trust Co. v. Chicago, K. & T. Ry. Co., 54 Fed. R. 598.

Treasurer of the United States are not necessary parties to a suit to recover from the receiver of a national bank, appointed by the comptroller, the amount of an assessment erroneously made by the comptroller, paid by the complainant to the receiver, and paid by him into the Treasury.[15] It has been held that a receiver appointed upon a creditor's bill should not be made a defendant to an ancillary foreclosure suit;[16] that a receiver of a corporation is a necessary party to a suit to enforce a corporate right of action;[17] that a receiver of a bank is a proper, but not a necessary, party to a suit in equity instituted before his appointment to recover from the bank money obtained by it through fraud;[18] that a receiver is an improper party to an action at law for a tort committed before his appointment,[19] but that he is a necessary party to such an action when he holds a policy insuring the corporation from loss by the tort and the plaintiff has joined the insurer with the receiver's corporation as a co-defendant;[20] and that he and the corporation may be joined as defendants to a bill to enjoin infringements of a patent and for an accounting of the profits made by infringements before and after his appointment;[21] that the creditors of an insolvent bank are necessary parties to a suit by a stockholder against the bank and its receiver to have his certificate canceled;[22] and that after the discharge of a receiver and the transfer of the property to a corporation, which, as part consideration for the purchase, agreed to pay all valid claims against the receiver, the purchaser is the only proper party to a suit to collect such a claim.[23]

In suits by or against strangers affecting the partnership property, surviving partners need not join with them the personal representatives of their deceased associate.[24] The English

[15] Brown v. Tillinghast, 84 Fed. R. 17.

[16] Continental Tr. Co. v. Toledo, St. L. & K. C. R. Co., 82 Fed. R. 642.

[17] Porter v. Sabin, 149 U. S. 473. But see Palestine W. & P. Co. v. City of Palestine, 91 Tex. 540; s. c., 44 S. W. R. 814; s. c., 40 L. R. A. 203.

[18] Denton v. Baker (C. C. A.), 79 Fed. R. 189; Speckart v. German Nat. Bank, 85 Fed. R. 12.

[19] Northern Pac. R. Co. v. Heflin (C. C. A.), 88 Fed. R. 93.

[20] Moore v. Los Angeles I. & S. Co., 89 Fed. R. 73. But see Palestine W. & P. Co. v. City of Palestine (Tex.), 44 S. W. R. 814; s. c., 40 L. R. A. 203.

[21] Union S. & S. Co. v. Philadelphia & R. R. Co., 69 Fed. R. 883.

[22] Dunn v. State Board Minn., 61 N. W. R. 27.

[23] Thompson v. Northern Pac. Ry. Co., 93 Fed. R. 384.

[24] Pagan v. Sparks, 2 Wash. C. C. 325.

rule was that "a court of equity in many cases considers the tenant in tail as having the whole estate vested in him, at least for the purposes of suit; and for these purposes does not look beyond the estate tail in a suit aiming by the decree to bind the right to the land."[25] "Those in remainder were considered as cyphers."[26] "It appears that this rule was originally founded upon analogy to common law. As a tenant in tail might bar subsequent remainder-men, — in fact, might at any moment make himself master of the entire estate,— it was considered by the court that he might be assumed to offer a satisfactory defense for all those subsequent interests. The court has, however, gone one step farther, and has treated infants as sufficient representatives of the inheritance, although they are unable, by reason of infancy, to bar remainder-men. In truth the court has gone to the full extent which is requisite for convenience in practice."[27] It has been held that a tenant for life and the contingent remainder-man in fee may represent the inheritance in a bill for specific performance, if the children of the remainder-man will inherit if he does not.[28] But the court refused to decide whether a will conveyed a fee or a life estate, when the parties were not in existence who would take the remainder if the estate were for life only.[29] Lord Eldon said that in most cases respecting trust property the beneficiaries of the trust were necessary parties.[30] The expression naturally suggests the inquiry, In what cases are they not to be made parties? There are some cases in which the existence or enjoyment of property is affected by the prayer of the suit. There are others in which the existence of the property is not affected, and the only object is to transfer it into the hands of the trustees.[31] In the latter cases the beneficiaries of the trust need not,[32] although it seems they may, be made parties.[33] In the former, when not too numerous, their presence was always

[25] Lord Eldon in Lloyd v. Johnes, Ves. 65.

[26] Lord Camden in Reynoldson v. Perkins, Ambler, 564.

[27] Calvert on Parties (2d ed.), 56.

[28] Sohier v. Williams, 1 Curt. 479.

[29] Taylor v. Fisk, 94 Fed. R. 242.

[30] Adams v. St. Leger, 1 B. & B. 182.

[31] Calvert on Parties (2d ed.), 277.

[32] Franco v. Franco, 3 Ves. 76; Carey v. Brown, 92 U. S. 171; Calvert on Parties (2d ed.), 277, 278.

[33] Harrison v. Rowan, 4 Wash. C. C. 202; McCampbell v. Brown, 48 Fed. R. 795; Hayes v. Pratt, 147 U. S. 557. *Contra*, Consolidated Water Co. v. City of San Diego, 92 Fed. R. 759.

required [34] before the equity rules. The rules, however, following an English chancery order,[35] provide that: "In all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate, or the proceeds, or the rents and profits, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit. But the court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties." [36] "It seems doubtful, however," says Daniell of the English order, "whether this order will apply to cases where a mortgagee seeks to foreclose the equity of redemption of estates which are subject to such trusts." [37] Trustees under a railroad mortgage,[38] or under any other trust-deed of a similar nature securing the rights in real property of a large number of beneficiaries,[39] are held, in all proceedings affecting the property which they thus hold, adequately to represent the latter, who will be bound, in the absence of fraud, by notice given, or a decree entered against them, although the court may in its discretion make any of such beneficiaries a party to the suit at his application.[40] A bondholder cannot sue to foreclose where there is a trustee under his mortgage in existence without making the trustee a defendant and alleging his refusal to sue, or at least his unwillingness to sue, and such a state of facts as to make the request an idle ceremony.[41]

[34] Whistler v. Webb, Bunb. 58; Greene v. Sisson, 2 Curt. 171; Oliver v. Piatt, 3 How. 333; s. c., 2 McLean, 268; Cross v. De Valle, 1 Wall. 5.

[35] 30th Order of August, 1841.

[36] Rule 49.

[37] Daniell's Ch. Pr. (2d Am. ed.) 304. See also Wilton v. Jones, 2 Y. & C. 244; Cross v. De Valle, 1 Wall. 1.

[38] Shaw v. Railroad Co., 100 U. S. 605, 611; Beals v. Illinois, Mo. & T. R. Co., 133 U. S. 290; Elwell v. Fosdick, 134 U. S. 500; Leavenworth County Com'rs v. Chicago, R. I. & P. Ry. Co., 134 U. S. 688.

[39] Van Vechten v. Terry, 2 Johns. Ch. (N. Y.) 197; Kerrison v. Stewart, 93 U. S. 155; McKee v. Lamon, 159 U. S. 317.

[40] Williams v. Morgan, 111 U. S. 684; Thomas v. Brownville, F. K. & P. R. Co., 109 U. S. 522; *infra*, § 201.

[41] Consol. Water Co. v. San Diego, 89 Fed. R. 272. It was held that a

And even where the mortgage can only be foreclosed at the request of a majority of the bondholders, the trustee need not join with him in the suit any of those who have made the request.[42] A provision requiring the request of the holder of one-fourth of the bonds before a foreclosure was held not to prevent a foreclosure at the suit of holders of a smaller number, when more than three-fourths were held by a party who had caused the default by misappropriating the earnings of the railroad.[43] In a foreclosure suit brought by holders of a minority of bonds, where there is a claim that the consent of the holders of a majority is required, it is proper to join the majority as defendants.[44] The fact that the same trust company represents two mortgages, the interest of the beneficiaries under which conflict, will make it proper to allow bondholders to be made parties to a foreclosure suit.[45] In certain cases committees of bondholders have been made parties to railroad foreclosures.[46] Under a railroad lease by which the lessee covenanted to pay to a bank selected by the lessor a sum sufficient to pay the interest upon the lessor's mortgage bonds and taxes, it was held that the bondholders might present their claim directly against the receivers of the lessee without the joinder of either the trustee under their mortgage or the receiver of the lessor who had been appointed by a State court.[47]

It has been held that to a bill against the heirs of a trustee to quiet the title to property conveyed by the trustee to the complainant, the beneficiary of the trust need not be joined as a party;[48] and that the beneficiaries must be made parties to a bill by a stranger to set aside the deed of trust for fraud,[49] and to a suit by one of several stockholders to set aside an agreement to pool their stock by depositing the same with trustees, the

bondholder cannot be joined as a co-plaintiff with the trustee. Consol. Water Co. v. San Diego, 92 Fed. R. 759.

[42] Grand Tr. Ry. Co. v. Central Vt. Ry. Co., 88 Fed. R. 622. See N. Y. S. & Tr. Co. v. Lincoln St. Ry. Co., 74 Fed. R. 67.

[43] Linder v. Hartwell R. Co., 73 Fed. R. 820.

[44] Toler v. East Tenn. & C. Ry. Co., 67 Fed. R. 168.

[45] Farmers' L. & Tr. Co. v. Northern Pac. R. Co., 66 Fed. R. 169.

[46] Farmers' L. & Tr. Co. v. Cape Fear & Y. V. Ry. Co., 71 Fed. R. 38.

[47] Mercantile Tr. Co. v. Baltimore & O. R. Co., 94 Fed. R. 722.

[48] Gridley v. Wynant, 23 How. 500.

[49] Collin Mfg. Co. v. Ferguson & Hutter's Trustee, 54 Fed. R. 721. *Contra*, Vetterlein v. Barnes, 124 U. S. 169.

other stockholders, as well as the trustees, are necessary parties.[50] It has been held that a corporation is so far a representative of its stockholders that none of them need be joined in a suit for an accounting, under a lease which provides for the payment of dividends directly to its stockholders.[51] It has been held that a State statute authorizing one or more officers of an unincorporated association to represent the others in the courts, when suing or being sued about a matter concerning their common interest, will be followed by a Federal court of equity, and the members conclusively presumed to have the same citizenship as such officers.[52]

§ 46. Suits by a complainant on behalf of himself and others similarly situated.— When a number of persons have a common interest in a thing which is the subject of litigation, and, in some instances, when a number of persons have a common interest in a question which is before the court for decision, one or more may sue or be sued in behalf of the rest. Judge Story divides the first of these divisions into two: "(1) When the question is one of a common and general interest, and one or more sue or defend for the benefit of the whole;" and "(2) when the parties form a volutary association for public or private purposes, and those who sue or defend may fairly be presumed to represent the rights and interests of the whole."[1] But there seems to be no reason for treating these two classes separately. When one or more thus file a bill on behalf of themselves and others similarly interested, they must state in the title of their bill that they so sue, and show that the others are numerous or unknown.[2] Any others of the class have the right to join with them in the suit at any time upon payment of their share of the costs,[3] and counsel fees[4] which have been then paid or incurred, provided they do not seek to

[50] Ryan v. Seaboard R. Co., 89 Fed. R. 397.

[51] Pacific R. of Mo. v. Atlantic & P. R. Co., 20 Fed. R. 277.

[52] Fargo v. Louisville, N. A. & C. Ry. Co., 6 Fed. R. 787; Whitman v. Hubbell, 30 Fed. R. 81; Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566. But see Chapman v. Barney, 129 U. S. 677, and *supra*, § 19.

§ 46. [1] Story's Eq. Pl., § 97.

[2] Hoe v. Wilson, 9 Wall. 501.

[3] Ogilvie v. Knox Ins. Co., 2 Black, 539; s. c., 22 How. 380; Ex parte Jordan, 94 U. S. 248; Hallett v. Hallett, 2 Paige (N. Y.), 15; Leigh v. Thomas, 2 Ves. Sen. 313; Ransom v. Davis, 18 How. 295; Story's Eq. Pl., § 90.

[4] Central R. Co. v. Pettus, 113 U. S. 116; Trustees v. Greenough, 105 U. S. 527.

act in hostility to the original complainants,[5] in which case the court may in its discretion allow them to intervene.[6] If their joinder as plaintiffs would oust the court of jurisdiction, they may be brought in as defendants.[7] Such a bill may be filed even when a majority of those interested object to the suit.[8] For "where a matter is necessarily injurious to the common right, the majority of the persons interested can neither excuse the wrong nor deprive all other parties of their remedy by suit."[9] To such a bill it is not necessary to make defendants all who object to its being filed, provided that enough are brought before the court to sufficiently represent their interest.[10] It was originally held that no one could sue on behalf of others who claimed for himself an interest in the matter in controversy distinct from that of those whom he sought to represent; for example, a mortgagee was not allowed to sue in behalf of general creditors while enforcing his mortgage;[11] but recent authorities seem to have changed this doctrine.[12] All on whose behalf one sues must appear to have an interest in the relief prayed for by him.[13] In such a suit, the bill may be dismissed at any time before decree by the consent of those who are then joined as plaintiffs,[14] but not afterwards, since by the decree a right becomes vested in the others.[15] The court will nearly always allow a bill filed by an individual in his own right to be amended, so as to allow him to sue on behalf of himself and other members of a class.[16]

[5] Forbes v. Memphis, El Paso & Pacific R. Co., 2 Woods, 323.

[6] Galveston R. Co. v. Cowdrey, 11 Wall. 459, 478.

[7] Brown v. Pacific Mail S. S. Co., 5 Blatchf. C. C. 525, 535. But see Stewart v. Dunham, 115 U. S. 61.

[8] Bromley v. Smith, 1 Simons, 8; Taylor v. Salmon, 4 Myl. & Cr. 134; Story's Eq. Pl., § 114. But see Jones v. Garcia del Rio, 1 Turn. & Russ. 300.

[9] Bromley v. Smith, 1 Simons, 8, 11.

[10] Clinch v. Financial Corporation, L. R. 4 Ch. App. 117, at p. 122; Story's Eq. Pl., § 135 b.

[11] Burney v. Morgan, 1 Sim. & S. 358, 362; Palmer v. Foote, 7 Paige (N. Y.), 437; White v. Hillacre, 3 Y. & C. 597.

[12] Galveston R. Co. v. Cowdrey, 11 Wall. 459; Mason v. Bogg, 2 Myl. & Cr. 443; Story's Eq. Pl., § 101, and cases there cited.

[13] Newton v. Earl of Egmont, 4 Simons, 574, 585; Jones v. Garcia del Rio, 1 T. & R. 297.

[14] Handford v. Storie, 2 Sim. & S. 196; Hubbell v. Warren, 8 Allen (Mass.), 173; Hirshfeld v. Fitzgerald, 157 N. Y. 166.

[15] Handford v. Storie, 2 Sim. & S. 196; York v. White, 10 Jurist, 168; Innes v. Lansing, 7 Paige (N. Y.), 583.

[16] Johnson v. Compton, 4 Simons, 47; Lloyd v. Loaring, 6 Ves. 773; Daniell's Ch. Pr. (5th Am. ed.) 236, note 6, and 245, and cases cited.

§ 47. Illustration of bills filed by representatives.— The ordinary cases of bills filed by one person of a class on behalf of others similarly situated are bills by stockholders of corporations;[1] by members of unincorporated associations;[2] by railroad bondholders,[3] of whom one holding bonds secured by successive mortgages may, after the death of all the trustees, sue for a foreclosure on behalf of himself and the holders of each class of the bonds which he owns;[4] and bills by creditors.[5] In a case where a railroad mortgaged its property directly, without the intervention of a trustee, to fifteen bondholders, naming them, and the adequacy of the security was doubtful, it was held that one could not sue on behalf of the rest, but that all the bondholders must be joined as parties to the bill.[6] Where there were one hundred and twenty bonds of $500 each, secured by a mortgage to a trustee, and all the bonds were held by three persons, it was held that all the bondholders were indispensable parties to a bondholder's foreclosure suit, although the plaintiff's bondholder filed his bill on behalf of the others as well as of himself.[7] It was held that such a suit cannot be brought by the holder of a certificate of stock which had not been transferred on the books of the corporation to his name.[8] Such bills may also be filed by one or more legatees,[9] at least if not residuary legatees;[10] by one of several next of kin;[11] by one of many partners;[12] by one of a class for the benefit of which a charity was founded;[13] and by one of the crew of a privateer seeking

§ 47. [1] Bacon v. Robertson, 18 How. 480; Wallworth v. Holt, 4 Myl. & Cr. 619; Taylor v. Salmon, 4 Myl. & Cr. 134; Hichens v. Congreve, 4 Russell, 562; Gray v. Chaplin, 2 Sim. & S. 267; Crease v. Babcock, 10 Met. (Mass.) 532.

[2] Bainbridge v. Burton, 2 Beav. 539.

[3] Trustees of the Wabash & Erie Canal Co. v. Beers, 2 Black, 448; Galveston R. Co. v. Cowdrey, 11 Wall. 459; Central R. Co. v. Pettus, 113 U. S. 116.

[4] Galveston R. Co. v. Cowdrey, 11 Wall. 459, 478.

[5] Fink v. Patterson, 21 Fed. R. 602.

[6] Railroad Co. v. Orr, 18 Wall. 471.

[7] Mangels v. Donau Brewing Co., 53 Fed. R. 513, per Hanford, C. J.

[8] Brown v. Duluth & N. Ry. Co., 53 Fed. R. 889, 894.

[9] Bennett v. Honywood, Ambler, 708; Story's Eq. Pl., § 104, and cases cited.

[10] Upon this point there is a conflict of authority. Compare Brown v. Ricketts, 3 J. Ch. (N. Y.) 555, and Davoue v. Fanning, 4 J. Ch. (N. Y.) 199, with Kettle v. Crary, 1 Paige (N. Y.), 417, note. See also Story's Eq. Pl., § 89.

[11] Story's Eq. Pl., § 105.

[12] Chancey v. May, Prec. Ch. 592; Small v. Atwood, 1 Younge, 407.

[13] Smith v. Swormstedt, 16 How. 388.

an account from a defendant who has collected their joint prize money;[14] but not by one of several importers to enjoin the seizure of their different imports under an unconstitutional statute.[15]

§ 48. Suits against one or more of a class.—Similarly, where persons who are jointly liable are very numerous, some may be sued instead of all, provided that the manner in which they are sued, and the fact that they are numerous, are stated in the bill.[1] Ordinarily, the complainant selects such of the class as he chooses to represent the rest. The persons thus selected may be a committee chosen by the rest of the class to act for them in the matters complained of, such as a reorganization committee of stockholders and bondholders,[2] or the managing committee of a clearing-house association.[3] It is proper, however, to name all of the class in the title to the bill, and then have the court select some of these to be served and to defend for the rest.[4] This rule has been applied to members of a club,[5] or of another unincorporated association when sued for the collection of its debts; or to enjoin a violation of the anti-trust act;[6] to members of a trades union engaged in a strike;[7] and to the stockholders[8] of a corporation in a suit brought by a creditor after its dissolution to recover the amount of its capital stock which has been divided among them.[9] The equity rule upon this subject is as follows: "When the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases the decree shall be

[14] Good v. Blewitt, 13 Ves. 397; West v. Randall, 2 Mason, 181, 194.

[15] Scott v. Donald, 165 U. S. 107.

§ 48. [1] Story's Eq. Pl., secs. 116, 117; McArthur v. Scott, 113 U. S. 340, 395.

[2] Railroad Co. v. Howard, 7 Wall. 392.

[3] Yardley v. Philler, 58 Fed. R. 746.

[4] Ayres v. Carver, 17 How. 591.

[5] Cullen v. Duke of Queensberry, 1 Brown's Ch. 101; Cousins v. Smith, 13 Ves. 544; Story's Eq. Pl., sec. 116.

[6] U. S. v. Coal Dealers' Ass'n of California, 85 Fed. R. 252.

[7] Am. Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions, 90 Fed. R. 598.

[8] Mandeville v. Riggs, 2 Pet. 482; Railroad Co. v. Howard, 7 Wall. 392.

[9] Wood v. Dummer, 3 Mason, 315.

without prejudice to the rights and claims of all the absent parties."[10] It has been said that "this rule has always been understood to modify somewhat the general doctrine in England, that parties, not formally served with process, may yet be bound on the principle of representation to the fullest extent that those are bound who are their representatives in the suit. The language of the reservation is that in such cases the decree shall be without prejudice to the rights and claims of all absent parties. The rule especially is framed to allow a suit to proceed without having all the members of an association or of a class of defendants formal parties; but, while preserving the right of the absent ones to afterwards litigate for themselves the same question, it does not prohibit the whole class, when plaintiffs, from taking the benefit of a decree in favor of those who represent them, nor preclude a plaintiff who has sued the whole class by their representatives, from binding the absent parties by supplemental proceedings to bring them in when known, if necessary, and subject them to the decree, when they have had that opportunity to defend against it."[11]

§ 49. Suits by or against one or more as representatives of a class claiming a common right.— In some instances when a number of persons have a common interest in the decision of a question of fact or law, though they have no common interest in any property which is the subject of litigation, yet, as they are said to claim under a common right, one or more of them have been allowed to represent the rest as plaintiffs or defendants in a suit to determine the disputed question.[1] Ordinarily, the complainant selects such defendants as he considers proper and sufficient; but he may name all of the class in the title of his bill and ask the court to select a few to defend on behalf of the rest.[2] Instances where a suit of this kind has been allowed by one or more as plaintiffs in behalf of others similarly situated have usually occurred when, though the plaintiff and those represented by him had no common inter-

[10] Rule 48; McArthur v. Scott, 113 U. S. 340, 395.

[11] Am. Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions, 90 Fed. R. 598, 605, per Hammond, J.

§ 49. [1] West v. Randall, 2 Mason, 181, 195.

[2] Ayres v. Carver, 17 How. 591.

est in property, yet he sought a determination of a question affecting the enjoyment of estates which, though distinct, came to him and the rest from a common source. Thus, one or more tenants or parishioners may sue a lord of a manor or parson, to establish a right of common,[3] or of turbary.[4] A few defendants have been allowed to represent a large class, not only when all of that class had some privity of estate, but also in other cases. Thus, a parson was allowed to sue a few on behalf of all his parishioners to establish a disputed right to tithes.[5] A lord of a manor may sue some on behalf of all of his tenants to establish their duty to grind at his mill, or his right of enclosure,[6] or to enforce a rent-charge.[7] Bills were sustained when brought by those interested in contesting the legality of the issue of certain certificates of indebtedness, against some on behalf of all of the holders of such certificates;[8] and when brought by the purchaser to set aside a sale to him by a decedent against the executor of the vendor and some of his heirs at law, the other heirs at law being unknown.[9] It seems that a bill can be sustained when filed by a claimant to the equitable title to a tract of land against some on behalf of all who have severally bought with notice parcels of it since his right accrued, praying that their conveyances be set aside as in fraud of his rights.[10] "And it has long been settled, that if a person has a common right against a great many of the king's subjects, inasmuch as he cannot contend with all the king's subjects, a court of equity will permit him to file a bill against some of them, taking care to bring so many persons before the court that their interests shall be such as to lead to a fair and honest support of the public interest; and when a decree has been obtained, then, with respect to the individuals whose interest is so fully and honestly established, the court

[3] Anon., 1 Chancery Cases, 269; Conyers v. Lord Abergavenny, 1 Atk. 285; Brown v. Vermuden, 1 Ch. Cas. 272; Smith v. Earl Brownlow, L. R. 9 Eq. 241.

[4] Baker v. Rogers, Sel. Ch. Cas. 74.

[5] Brown v. Vermuden, 1 Ch. Cas. 272; Hardcastle v. Smithson, 3 Atk. 246.

[6] Brown v. Vermuden, 1 Ch. Cas. 272.

[7] Attorney-General v. Wyburgh, 1 P. Wms. 599; s. c., 2 Eq. Cas. Abr. 167; Attorney-General v. Jackson, 11 Ves. 365, 367; Attorney-General v. Shelly, 1 Salk. 162.

[8] Sheffield Water Works v. Yeomans, L. R. 2 Ch. App. 8.

[9] Alger v. Anderson, 78 Fed. R. 729, 733.

[10] Ayres v. Carver, 17 How. 591.

on the footing of the former decree will carry the benefit of it into execution against other individuals who were not parties."[11] Thus, a city may file such a bill to establish its right to levy a duty;[12] and it has been suggested that a suit may thus be brought by one of many persons jointly interested in a geographical trade-mark.[13] In these cases, as has been said, a decree against the defendants before the court has been held in England to bind others of the same class;[14] but, on account of the positive language of the equity rule previously quoted, it is doubtful whether these decisions would be followed here.[15]

§ 50. Omission of defendants not within the jurisdiction of the court.— The second exception to the general rule is, that persons who cannot be subjected to the jurisdiction of a court of equity need not be joined as parties to a bill, provided that their presence is not indispensable to a decree. "When any are absent from the jurisdiction who, if within it, would be necessary parties defendant, their presence will ordinarily be dispensed with, provided an equitable and effectual decree can be made against those who have been served with process. The former English practice was to charge in the bill the fact of the absence from the realm of any who otherwise ought to have been joined as defendants, and to pray that they might be served with process if they came within the jurisdiction. Under the modern English system this strictness is not required, and it seems to be sufficient if the excuse for not making the absent parties defendant appears on the face of the bill."[1] This rule of equity practice has been confirmed by statute in the United States. "When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and

[11] Lord Eldon in Weale v. West Middlesex Water Works Co., 1 Jac. & Walk. 358, 369.

[12] City of London v. Perkins, 3 Bro. Parl. Cas. 602; Mayor of York v. Pilkington, 1 Atk. 282.

[13] City of Carlsbad v. Tibbetts, 51 Fed. R. 852, 856, per Putnam, J.

[14] Brown v. Vermuden, 1 Ch. Cas. 272; Lord Eldon in Weale v. West Middlesex Water Works Co., 1 Jac. & Walk. 358, 369.

[15] See McArthur v. Scott, 113 U. S. 340, 395; Am. Steel & Wire Co. v. Wire Drawers' & Dye Makers' Unions, 95 Fed. R. 598, quoted *supra*, § 48.

§ 50. [1] Judge Dwight Foster in Palmer v. Stevens, 100 Mass. 461, 466.

adjudication of the suit between the parties who are properly before it, but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of, nor found within the district as aforesaid, shall not constitute matter of abatement or objection to the suit."[2] This statute is, however, merely declaratory, and does not enlarge the power previously possessed by courts of equity.[3] The power has been extended by rule, and parties not indispensable to an equitable decree may be omitted if their joinder would oust the court of jurisdiction by placing persons of the same citizenship upon different sides of a controversy. "In all cases where it shall appear to the court that persons who might otherwise be deemed necessary or proper parties to the suit cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may in their discretion proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the absent parties."[4] "If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court, or that they cannot be joined without ousting the jurisdiction of the court as to other parties. And as to persons who are without the jurisdiction and may properly be made parties, the bill may pray that process may issue to make them parties to the bill if they should come within the jurisdiction."[5] Such being the general rule, it remains to be considered what parties are indispensable to an equitable decree. As has been said above, a court of equity will ordinarily seek to have before it as parties all persons in any manner interested in the subject-matter of the litigation, in order to make a decree that will prevent the necessity of a subsequent appeal to its aid.[6] This

[2] U. S. R. S., § 737. See Conolly v. Wells, 33 Fed. R. 205; Wall v. Thomas, 41 Fed. R. 620.

[3] Shields v. Barrow, 17 How. 130, 141.

[4] Rule 47.

[5] Rule 22.

[6] § 42.

rule, however, having been established for the promotion of justice, will be modified whenever its rigid enforcement would prevent the court from doing justice to a person invoking its protection. Accordingly it will proceed to a decree without the presence of such parties as cannot be subjected to its jurisdiction, provided it can determine the respective rights of the parties before it without affecting those of the rest. There are three classes of parties: formal parties; parties necessary to a decree which completely disposes of the controversy, so that the aid of the court need not be invoked again, but whose interests are so far separable from those of the parties before the court, that it can dispose of the controversy between the latter without affecting the interests of the former; and parties with an interest in the controversy "of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience."[1] Of these the first two classes can always be omitted, when they are beyond the reach of the process of the court or when their joinder would oust its jurisdiction. The rule upon the subject has been well stated by Mr. Justice Bradley: "The general rule as to parties in chancery is that all ought to be made parties who are interested in the controversy, in order that there may be an end of litigation. But there are qualifications of this rule arising out of public policy and the necessity of particular cases. The true distinction appears to be as follows: First, when a person will be directly affected by a decree he is an indispensable party, unless the parties are too numerous to be brought before the court, when the case is subject to a special rule. Secondly, when a person is interested in the controversy, but will not be directly affected by a decree made in his absence, he is not an indispensable party, but he should be made a party if possible, and the court will not proceed to a decree without him if he can be reached. Thirdly, when he is not interested in the controversy between the immediate litigants, but has an interest in the subject-matter, which may be conveniently settled in the suit, and

[1] Mr. Justice Curtis in Shields v. Barrow, 17 How. 130, 139. See Chadbourne v. Coe, 51 Fed. R. 479.

thereby prevent further litigation, he may be a party or not at the option of the complainant."[8]

§ 51. Formal parties who may be omitted when without the jurisdiction.— Formal parties are those with a naked legal title, but no equitable interest in the subject-matter of the controversy. If the persons really interested are before the court, formal parties can always be omitted if without the jurisdiction;[1] and their joinder, no matter whether as plaintiffs or defendants, cannot oust the court of jurisdiction, as they are in reality upon neither side of the controversy.[2] Such are: a husband against whom no relief is sought, in a suit by his wife to enforce the trusts of a marriage settlement;[3] trustees of prior railroad mortgages in a suit for the foreclosure of a subsequent mortgage and the sale of the mortgaged property subject to their liens;[4] and parties with the naked legal title having no interest in the controversy.[5] A person against whom an injunction is sought, unless he consents thereto, is never a nominal party.[6] When a suit is brought to recover the possession of real or personal property the person in possession is not a formal party.[7]

§ 52. Parties whose interest is separable.— The second class is not so easy to define; and it is difficult to mark the limits between this and the third class of parties who are always indispensable. It includes all having an interest in the controversy so far separable from that of those before the court that a decree can be made and enforced which disposes of the matter in dispute between the latter without affecting their

[8] Williams v. Brownhead, 19 Wall. 563, 571. See Chadbourne v. Coe, 51 Fed. R. 479.

§ 51. [1] Simms v. Guthrie, 9 Cranch, 19, 25; Wormley v. Wormley, 8 Wheat. 421, 451; Boon's Heirs v. Chiles, 8 Pet. 532; Union Bank of Louisiana v. Stafford, 12 How. 327; New Orleans Canal & Banking Co. v. Stafford, 12 How. 343.

[2] Wormley v. Wormley, 8 Wheat. 421, 451; Removal Cases, 100 U. S. 457; Pacific R. Co. v. Ketchum, 101 U. S. 289; Walden v. Skinner, 101 U. S. 577; Harter v. Kernochan, 103 U. S. 562; *supra*, § 10.

[3] Wormley v. Wormley, 8 Wheat. 421; Taylor v. Holmes, 14 Fed. R. 499. But see Watts v. Waddle, 1 McLean, 200.

[4] Pacific R. Co. v. Ketchum, 101 U. S. 289, 298.

[5] Simms v. Guthrie, 9 Cranch, 19, 25; Boon's Heirs v. Chiles, 8 Pet. 532; Union Bank of Louisiana v. Stafford, 12 How. 327; New Orleans Canal & Banking Co. v. Stafford, 12 How. 343; Walden v. Skinner, 101 U. S. 577, 588; Bacon v. Rives, 106 U. S. 99.

[6] Ward v. Arredondo, 1 Paine, 410; Mills v. Hurd, 32 Fed. R. 127.

[7] Mass. & So. Const. Co. v. Cane Creek Tp., 155 U. S. 283.

rights.[1] Thus, a trustee or director or executor beyond the jurisdiction has been held properly omitted in a suit against his colleagues for a breach of trust, or for an accounting.[2] For a trustee's liability is joint and several.[3] One of the next of kin[4] may sue an administrator and his sureties; and a legatee,[5] at least if not a residuary legatee,[6] may sue an executor to recover his share of a decedent's estate without joining the rest of the class to which he belongs. It seems that the executor of a dead debtor need not be a party to a bill brought by a creditor of the estate to obtain payment out of assets in the hands of a legatee.[7] Subsequent lienors are not indispensable parties to a foreclosure suit.[8] In a suit against a firm by strangers, a partner beyond the jurisdiction may perhaps be omitted if no injustice will be done him by a decree in his absence.[9] It has been held that in a suit by one partner against another for an account of money received by the defendant in excess of his share of the firm assets, partners beyond the jurisdiction may be omitted if it appears that each has received his full share of the joint property.[10] A subcontractor who has fraudulently collected money from the United States may be sued at law to recover this without the joinder of the contractor, although the latter at the former's instigation made

§ 52. [1] Cameron v. McRoberts, 3 Wheat. 591; Mallow v. Hinde, 12 Wheat. 193; Gridley v. Wynant, 23 How. 500; Horn v. Lockhart, 17 Wall. 570; Nesmith v. Calvert, 1 Woodb. & M. 34.

[2] Parsons v. Howard, 2 Woods, 1, 5; Heath v. Erie Ry. Co., 8 Blatchf. C. C. 345; Hazard v. Durant, 19 Fed. R. 471, 476; Plume & A. Mfg. Co. v. Baldwin, 87 Fed. R. 785. But see Wall v. Thomas, 41 Fed. R. 620.

[3] Parsons v. Howard, 2 Woods, 1, 5; Heath v. Erie Ry. Co., 8 Blatch. 347.

[4] Payne v. Hook, 7 Wall. 425. See, however, West v. Randall, 2 Mason, 181; Wisner v. Barnet, 4 Wash. C. C. 631, 642; Greene v. Sisson, 2 Curtis, 171.

[5] Dandridge v. Washington's Ex'rs, 2 Pet. 377. See West v. Randall, 2 Mason, 181.

[6] See McArthur v. Scott, 113 U. S. 340, 395; Braduin v. Harpur, Ambler, 374; Hawly v. Harvey, 4 Beav. 215; s. c., 5 Beav. 134.

[7] Milligan v. Milledge, 3 Cranch, 220.

[8] Brewster v. Wakefield, 22 How. 118, 129; Union Bank of Louisiana v. Stafford, 12 How. 327; New Orleans C. & B. Co. v. Stafford, 12 How. 343; Howard v. Railway Co., 101 U. S. 837; Nalle v. Young, 160 U. S. 624. See *supra*, § 44.

[9] Cowslad v. Cely, Prec. Ch. 83; Darwent v. Walton, 2 Atk. 510; Calvert on Parties, Book III, ch. xxiii; Vose v. Philbrook, 3 Story, C. C. 335. *Contra*, Parsons v. Howard, 2 Woods, 1; Bell v. Donohoe, 17 Fed. R. 710.

[10] Towle v. Pierce, 12 Met. (Mass.) 329; Kilbourn v. Sunderland, 130 U. S. 505.

the fraudulent representations.[11] When one of two joint contractors has fraudulently released his interest in the contract, he is not indispensable to a bill filed by his associate against the other party.[12] To a bill to enjoin the infringement of a patent, one partner can be made a defendant without the other members of the infringing firm, unless an accounting is sought, in which case all must be joined.[13] "The owners of partial interests in contracts for land, acquired subsequently to their execution, are not necessary parties to bills for their enforcement. The original parties on one side are not to be mixed up in controversies between the parties on the other side, in which they have no concern."[14] An heir may file a bill for the specific performance of a contract entitling his ancestor to purchase land without bringing in the personal representative of his ancestor, provided that he offers himself to provide for the payment of the purchase-money.[15] Specific performance of a contract for the sale of land may be enforced against one of several joint tenants without joining the others with him as defendants.[16] It was held that to a bill to set aside a deed and power of attorney for the sale of land, a purchaser of part of the land from one of the defendants was not an indispensable party.[17] The assignor of a claim is not a necessary party to a suit upon it by his assignee,[18] unless the assignment be executory,[19] or the assignor has an equitable interest in the claim.[20] A railway company is not an indispensable party to a bill against its receiver to enforce specific performance of a contract made by it.[21] The directors of a corporation are not indispensable parties to a suit by a stockholder to restrain it from acting in violation of his rights.[22] To a bill to restrain

[11] U. S. v. Salisbury, 157 U. S. 121.

[12] Canal Co. v. Gordon, 6 Wall. 561; U. S. v. Salisbury, 157 U. S. 121.

[13] American B. Mach. Co. v. Crosman, 57 Fed. R. 102.

[14] Mr. Justice Field in Willard v. Tayloe, 8 Wall. 557, 571. But see Hoxie v. Carr, 1 Sumner, 173.

[15] Prout v. Roby, 15 Wall. 471.

[16] Stephen v. Beall, 22 Wall. 329.

[17] Billings v. Aspen M. & S. Co., 51 Fed. R. 338, 350. See Hicklin v. Marco, 56 Fed. R. 549.

[18] Batesville Inst. v. Kauffman, 18 Wall. 151; Trecothick v. Austin, 4 Mason, 16.

[19] Land Co. v. Elkins, 20 Fed. R. 545.

[20] Hubbard v. Manhattan Tr. Co. (C. C. A.), 87 Fed. R. 51, 57; Western Nat. Bank v. Armstrong, 152 U. S. 346.

[21] Express Co. v. Railroad Co., 99 U. S. 191.

[22] Heath v. Erie Ry. Co., 8 Blatch. C. C. 347.

the directors of a corporation from negotiating a fraudulent sale of its property, the person to whom the sale is about to be made is not an indispensable party if no contract has been made with him.[23] In proceedings under section 16 of the Interstate Commerce Act against a railroad company to enforce an order of the commission, it is not necessary that another carrier making the forbidden rate jointly with the defendant be made a party when he is without the jurisdiction.[24] To a suit by one indorser of a bill of exchange to restrain the collection of a judgment for the amount of the bill against him, upon the ground that the bill had been paid by another indorser, the latter indorser is not a necessary party.[25] To a bill by a creditor to satisfy a judgment out of land in a debtor's possession, but fraudulently conveyed by him to a person beyond the jurisdiction of the court, the person in whose name the land stood was held not to be an indispensable party.[26] To a bill to enjoin the execution of a judgment of ejectment and to decree a conveyance of lands, when the plaintiffs had an equitable title only, the persons whose legal title the complainants asserted were held properly omitted, when no relief was prayed against them, and their joinder would have ousted the court of jurisdiction.[27] It has been held that a tenant in common of a water-right may sue to enjoin an injury to the property without making his co-tenant a party.[28] It has been said that, to a bill by a private individual to enjoin the maintenance of a public nuisance, neither persons jointly interested with him nor those jointly guilty with the defendant are indispensable parties.[29] It has been suggested that the absence of one person guilty of a joint fraud might not prevent the court from taking jurisdiction over the others.[30] And in general to a suit for

[23] Abbot v. American H. R. Co., 4 Blatchf. C. C. 489; Wallace v. Holmes, 9 Blatchf. C. C. 65. But see Elkins v. Camden & A. R. Co., 36 N. J. Eq. 241.

[24] Interstate Com. Com'n v. Texas & P. Ry. Co., 52 Fed. R. 187; s. c. as T. & P. Ry. Co. v. Interstate Com. Com'n, 162 U. S. 197, 265.

[25] Atkins v. Dick, 14 Pet. 114.

[26] McCoy v. Rhodes, 11 How. 131, 141. But see Billings v. Aspen M. & S. Co., 51 Fed. R. 333.

[27] Simms v. Guthrie, 9 Cranch, 19, 25. See also Boon's Heirs v. Chiles, 8 Pet. 532. But compare Mallow v. Hinde, 12 Wheat. 193. A border case is Elmendorf v. Taylor, 10 Wheat. 152.

[28] Union M. & M. Co. v. Dangberg, 81 Fed. R. 73, 87.

[29] Miss. & Mo. R. Co. v. Ward, 2 Black, 485.

[30] Judge Dwight Foster in Palmer v. Stevens, 100 Mass. 461, 466. See

an injunction against a tort,[31] or the infringement of a patent not committed under color of a contract right,[32] one or more of the joint wrong-doers may be omitted. Thus, the officers, agents and stockholders of a corporation may be enjoined from infringing a patent while acting for the company when the corporation itself is not a party and is beyond the jurisdiction.[33] In an action by a creditor of a corporation to enforce the individual liability of its directors or stockholders, or to collect unpaid assessments or subscriptions from them, he cannot usually sue alone at law, but should file a bill in equity in behalf of himself and the other creditors, if any;[34] and he may ordinarily make one, some or all of the stockholders parties, according to his pleasure.[35] A State is not an indispensable party to a bill seeking to restrain its officers from levying for its benefit an illegal tax;[36] nor, it has been held, to a bill to prevent their illegal issue of land warrants for property which it had agreed to convey to the plaintiff;[37] nor to a bill to restrain their unlawful issue of bonds which would diminish the value of bonds held by the complainant.[38] To such bills the persons to whom the unlawful issue of bonds or land warrants is about to be made, are not indispensable parties.[39]

§ 53. Parties indispensable to a decree.— No suit, however, can proceed unless the court have before it as parties all persons who will be directly affected by the decree sought, or whose obedience is necessary to its enforcement, when it does not appear that they consent thereto.[1] A person is affected by

also Heath v. Erie Ry. Co., 8 Blatchf. C. C. 347. But see Bell v. Donohoe, 17 Fed. R. 710; Wall v. Thomas, 41 Fed. R. 620.

[31] Miss. & Mo. R. Co. v. Ward, 2 Black, 485.

[32] American B. Mach. Co. v. Crosman, 57 Fed. R. 1021.

[33] Edison El. L. Co. v. Packard El. L. Co., 61 Fed. R. 1002.

[34] Hornor v. Henning, 93 U. S. 228; Terry v. Little, 101 U. S. 216; Terry v. Tubman, 92 U. S. 156; Pollard v. Bailey, 20 Wall. 526; Welles v. Graves, 41 Fed. R. 459; First Nat. Bank v. Peavey, 75 Fed. R. 154. But see Alderson v. Dole (C. C. A.), 74 Fed. R. 29; *supra*, § 5.

[35] Ogilvie v. Knox Ins. Co., 22 How. 380; Hatch v. Dana, 101 U. S. 205; Manufacturing Co. v. Bradley, 105 U. S. 175.

[36] Osborn v. Bank of U. S., 9 Wheat. 738; Dodge v. Woolsey, 18 How. 331.

[37] Davis v. Gray, 16 Wall. 203; Hancock v. Walsh, 3 Woods, 351. But see Cunningham v. Macon & B. R. Co., 109 U. S. 446, 453.

[38] Board of Liquidation v. McComb, 92 U. S. 531; *supra*, § 37.

[39] Davis v. Gray, 16 Wall. 203, 233.

§ 53. [1] See § 55. But see Eagle Mfg. Co. v. Miller, 41 Fed. R. 851.

a decree when his rights against, or liability to, any of the parties to the suit is thereby determined. If a decree in favor of the complainant would cast a cloud upon another's title, that person, it seems, is thereby directly affected.[2] A State is an indispensable party to a bill against its officers to compel specific performance by them for it of its contract for the sale of land;[3] or to establish a claim to property held by its officers claiming a title in the State thereto;[4] or a claim to corporate stock registered in its name, the certificates of which are held by its officers;[5] or to enjoin its officers from commencing a suit in its name;[6] but not, it has been held, to a bill by the United States against a private individual to cancel a contract between him and the State for the purchase of land obtained by the State from the plaintiff through mistake or fraud.[7] The trustee of an active trust is a necessary party to a suit affecting the trust estate.[8] Every party to a contract, whether of sale or for another purpose, except one who has released his interest[9] or an agent through whom the title has passed,[10] is ordinarily a necessary party to a suit to enforce it;[11] or to set it aside;[12] or, unless its

[2] Young v. Cushing, 4 Biss. 456; California v. Southern Pac. R. Co., 157 U. S. 229. But see Hicklin v. Marco, 56 Fed. R. 549. It was held improper to compel defendant to make a deed confirming complainant's title to land conveyed by the latter's grantors when such grantors were not parties. Zenbrugg v. Reed (N. J. Ch., 1896), 35 Atl. R. 298.

[3] Preston v. Walsh, 10 Fed. R. 815. See also Walsh v. Preston, 109 U. S. 297.

[4] Cunningham v. Macon & B. R. Co., 109 U. S. 446.

[5] Christian v. Atlantic & N. C. R. Co., 133 U. S. 233.

[6] In re Ayers, 123 U. S. 443. But see *supra*, § 37.

[7] Williams v. U. S., 138 U. S. 514, 516.

[8] McRea v. Branch Bank of Alabama, 19 How. 376; O'Hara v. MacConnell, 93 U. S. 150; Thayer v. Life Ass'n, 112 U. S. 717; American B. S. v. Price, 110 U. S. 61; Billings v. Aspen M. & S. Co., 51 Fed. R. 338, 350; s. c. in C. C. A., 52 Fed. R. 250. But see New Chester Water Co. v. Holly Mfg. Co. (C. C. A.), 58 Fed. R. 19; *supra*, § 45.

[9] Canal Co. v. Gordon, 6 Wall. 561.

[10] Donovan v. Campion, 85 Fed. R. 71; Gross v. George W. Scott Mfg. Co., 48 Fed. R. 85; Hamilton v. Savannah, F. & W. Ry. Co., 49 Fed. R. 412. But see California v. So. Pac. Co., 157 U. S. 229.

[11] Mallow v. Hinde, 12 Wheat. 193; Shields v. Barrow, 17 How. 130; Gregory v. Stetson, 133 U. S. 579; Perin v. Megibben, 53 Fed. R. 86; Rollins Inv. Co. v. George, 48 Fed. R. 776.

[12] Shields v. Barrow, 17 How. 130; Coiron v. Millaudon, 19 How. 113; Gaylords v. Kelshaw, 1 Wall. 81; Ribon v. Railroad Cos., 16 Wall. 446; Lawrence v. Wirtz, 1 Wash. C. C. 417; Tobin v. Walkinshaw, 1 McAll. 26; Bell v. Donohoe, 17 Fed. R. 710; Florence S. Mach. Co. v. Singer Mfg. Co., 4 Fisher's Pat. Cas. 329; s. c., 8

performance would amount to a nuisance,[13] to enjoin a person from carrying it into effect;[14] even, it has been held in a case at Circuit, when the other parties are co-trustees beyond the jurisdiction of the court.[15] Thus, a railway company is an indispensable party to a suit to enjoin another railway company from constructing a road under a lease by it.[16] The assignors and assignees of a patent are necessary parties to a bill against the Commissioner to expunge it from the records of the Patent Office.[17]

To a bill against the administrator with the will annexed of Kosciuszko, claiming a legacy under an alleged codicil to the will, foreigners claiming the assets of the deceased as heirs at law were held necessary parties.[18] To a bill between parties for an accounting, all the surviving partners and the representatives of a deceased partner, even when alleged to be insolvent, are, it seems, indispensable parties,[19] unless it can be shown that each of those omitted has received his full share of the assets, and that no claim is made against him.[20] All the partners must be joined as plaintiffs and defendants in a suit to recover money due the firm.[21] To a partition suit all of the tenants in common are indispensable parties.[22] A person in possession under a claim of a title or interest in property is a necessary party to a suit affecting it.[23] The mortgagor is a necessary party to a suit by the mortgagee against a third person to re-

Blatchf. C. C. 113; Chadbourne v. Coe, 45 Fed. R. 823; Empire C. & T. Co. v. Empire C. & M. Co., 150 U. S. 159; New Orleans W. Co. v. New Orleans, 164 U. S. 471; s. c. in C. C. A., 51 Fed. R. 479; Clark v. Great Northern Ry. Co., 81 Fed. R. 282. But see French v. Shoemaker, 14 Wall. 314; West v. Duncan, 42 Fed. R. 480; Smith v. Lee, 77 Fed. R. 779.

[13] Miss. & Mo. R. Co. v. Ward, 2 Black, 485.

[14] Northern Ind. R. Co. v. Michigan C. R. Co., 15 How. 233. But see Heriot v. Davis, 2 Woodb. & M. 229; Boon's Heirs v. Chiles, 8 Pet. 532.

[15] Wall v. Thomas, 41 Fed. R. 620.

[16] Northern Ind. R. Co. v. Mich. C. R. Co., 15 How. 233.

[17] Backus P. S. H. Co. v. Simonds, 2 App. D. C. 290.

[18] Armstrong v. Lear, 8 Pet. 52.

[19] Bank v. Carrollton R. Co., 11 Wall. 624; Bartle v. Coleman, 8 Cranch, C. C. 283; Gray v. Larrimore, 2 Abb. C. C. 542.

[20] Towle v. Pierce 12 Met. (Mass.) 329; Kilbourn v. Sunderland, 130 U. S. 505.

[21] Edgell v. Felder, 84 Fed. R. 69.

[22] Barney v. Baltimore City, 6 Wall. 280.

[23] Williams v. Bankhead, 19 Wall. 563; Young v. Cushing, 4 Biss. 456. But see Ringo v. Binns, 10 Pet. 269, 281; Metropolitan Bank v. St. Louis Dispatch Co., 149 U. S. 436, 450; Hicklin v. Marco (C. C. A.), 56 Fed. R. 549.

move a cloud upon the title;[24] or to prevent an injury to the property when the decree must necessarily adjudicate unsettled rights of the mortgagor.[25] It is the safer practice to join the mortgagor as a party defendant to a bill by the mortgagee of a patent seeking an injunction against its infringement with damages or an account of profits.[26] The mortgagor is not an indispensable, although he is a proper, party to a bill to collect a mortgage from a purchaser who has assumed it, when before the bill is filed the mortgaged property was sold upon the foreclosure of a prior mortgage.[27] To a bill to enforce specific performance of a contract, providing for the sale of land the title to which was in one party, and its distribution between both parties to the contract, when filed, after the death of each, by the personal representatives of the one as complainants, against the heirs-at-law of the other as defendants, the executors of the defendants' ancestor are necessary if not indispensable parties defendant, and the heirs-at-law of the complainants' decedent are not.[28] All a man's heirs-at-law are indispensable parties to a bill by one of them to set aside a sale of his property under a decree; and to such a bill the party to the former suit at whose instance the sale was made is also an indispensable party.[29] All a woman's heirs have been held necessary parties to a bill to set aside a marriage settlement.[30] To a bill by a stockholder to set aside the foreclosure of a railroad mortgage, the trustees of the mortgage foreclosed, the mortgagor, the purchaser, and enough of the stockholders and bondholders as consented to the foreclosure to represent the remainder, are indispensable parties.[31] A corporation or its receiver[32] must be a party to a suit to enforce a right against a third person which the corporation refuses to assert,[33] or to prevent the waste of corporate assets.[34]

[24] Bettes v. Dana, 2 Sumner, 383.

[25] Consol. Water Co. v. San Diego, 87 Fed. R. 369.

[26] Waterman v. Mackenzie, 138 U.S. 252, 261; quoted *supra*, § 44.

[27] Kelly v. Ashford, 133 U. S. 610, 626. But see Skinner v. Harker, 23 Colo. 335; *supra*, § 44.

[28] Seymour v. Freer, 8 Wall. 202, 218. See Prout v. Roby, 15 Wall. 471.

[29] Hoe v. Wilson, 9 Wall. 501; Harwood v. Railroad Co., 17 Wall. 78. But see Alger v. Anderson, 78 Fed. R. 729.

[30] McDonnell v. Eaton, 18 Fed. R. 710.

[31] Ribon v. Railroad Cos., 16 Wall. 446.

[32] Porter v. Sabin, 149 U. S. 473.

[33] Davenport v. Dows, 18 Wall. 626; New Jersey Central R. Co. v. Mills, 113 U. S. 249, 256; Bell v. Donohue, 17 Fed. R. 710; Swan L. & C. Co. v. Frank, 148 U. S. 603.

[34] Putnam v. Rich, 56 Fed. R. 416.

If a receiver has been appointed he is an indispensable party to such a suit, even although the State court which appointed him refuses to authorize the suit against him.[35]

The trustees and county treasurer of an Iowa township are necessary parties to a suit by a taxpayer to prevent payment to the holder of bonds claimed to be invalid.[36] It has been said that to a bill by the receiver of a water company to establish his right to fix the water rates, all consumers of the water must be made parties.[37] It seems that the principal debtor, or his assignee in bankruptcy or insolvency, is a necessary party to a suit against a surety.[38] To a suit by a creditor to enforce a lien upon property through a trust-deed made for the benefit of a surety, both the trustee and his beneficiary are indispensable parties, although the property is in the possession of neither of them; but if filed in a double aspect, either for the complainant's individual benefit, or on behalf of the other creditors of the principal debtor, a sale may be ordered without having the surety or his trustee before the court.[39] So, a debtor, or if a bankrupt or insolvent, his assignee, is a necessary party to a creditor's suit to enforce a lien[40] or to levy[41] upon property in which the debtor has an interest, or to collect[42] a debt due the debtor. A corporation must be joined as a defendant to a bill for a receiver;[43] to a bill filed by a creditor to apply to the

[35] Porter v. Sabin, 149 U. S. 473; *supra*, § 9; *infra*, § 250.

[36] Sully v. Drennan, 118 U. S. 287. Compare Harter v. Kernochan, 103 U. S. 562. In a suit by citizens to restrain the erection of a schoolhouse on land dedicated for a public park, it was held error to refuse to allow an amendment to the bill making the original donors of the land parties complainant. Rowzee v. Pierce, 75 Miss. 846; s. c., 23 S. R. 807; s. c., 40 L. R. A. 402.

[37] Ward v. San Diego L. & W. Co., 79 Fed. R. 656, 667; s. c. in C. C. A., 94 Fed. R. 849. But see Clyde v. Richmond & D. R. Co., 57 Fed. R. 436.

[38] Robertson v. Carson, 19 Wall. 94. See also Russell v. Clark, 7 Cranch, 69. But compare Rule 51.

[39] McRea v. Branch Bank of Alabama, 19 How. 876.

[40] Russell v. Clark, 7 Cranch, 69; Robertson v. Carson, 19 Wall. 94. But see Heriot v. Davis, 2 W. & M. 229. It was held that in a suit against a bank for money deposited by complainant's agent, and applied by the bank to debts due from the agent, the latter was a proper and necessary party; but on a decree for complainant, without there appearing any right or liability for or against the agent, it is proper then to dismiss him. Union Stock Yards Nat. Bank v. Moore (C. C. A.), 79 Fed. R. 705.

[41] Wilson v. City Bank, 8 Sumner, 422.

[42] U. S. v. Howland, 4 Wheat. 108.

[43] Elkhart Nat. Bank v. Northwestern G. L. Co., 84 Fed. R. 76.

payment of its indebtedness money due it from its stockholders,[44] or to enforce the individual liability of its stockholders;[45] to a bill to compel a transfer upon its books of stock which stands in the name of another than the complainant,[46] and an unincorporated association to a bill to foreclose a mortgage upon a certificate of membership which cannot be transferred without its consent.[47] To a bill for the dissolution of a corporation and an accounting for the benefit of a single stockholder, not on behalf of the rest, the other stockholders or their representatives must be made defendants.[48] To a bill by a legatee against the husband of a residuary legatee or devisee to obtain payment of the complantant's legacy from assets in the defendant's possession, the residuary legatee herself, or, if she be dead, her personal representative, is a necessary party,[49] at least when it does not appear that she or her personal representative is without the jurisdiction of the court. To a bill to foreclose a mortgage by an executor, it was held that all devisees of any part of the property were indispensable parties.[50] It was held that in a suit to compel the execution and foreclosure of a mortgage, prior incumbrancers and others claiming an interest in the mortgaged property were necessary parties, when it did not appear that their joinder was impossible or would oust the jurisdiction.[51] In one case, where a bill was filed to stay proceedings in ejectment, the court required the nominal defendant at law to be joined as a co-plaintiff with the real per-

[44] Brigham v. Luddington, 12 Blatchf. C. C. 237; First Nat. Bank v. Smith, 6 Fed. R. 215; Dormitzer v. Illinois & St. L. Bridge Co., 6 Fed. R. 217; Walsh v. Memphis, C. & N. W. R. Co., 6 Fed. R. 797.

[45] Elkhart Nat. Bank v. Northwestern E. L. Co., 84 Fed. R. 76.

[46] Kendig v. Dean, 97 U. S. 423; Rogers v. Nortwick, 45 Fed. R. 518. But see Gould v. Head, 41 Fed. R. 240, 248; Williamson v. Krohn, 66 Fed. R. 655.

[47] Metropolitan Nat. Bank v. St. Louis Dispatch Co., 149 U. S. 436.

[48] Watson v. U. S. Sugar Refinery Co., 68 Fed. R. 769. Where a corporation had been required to deposit moneys with the treasurer of the Commonwealth to indemnify those who should sustain damage by the construction of a canal, and the fund was insufficient to pay all claims, it was held that a bill to have certain damages paid therefrom should make parties to the suit all interested in the funds. Cowell v. Cape Cod Ship Canal Co., 41 N. E. R. 290, 164 Mass. 235. Similar is Childs v. N. B. Carstein Co., 76 Fed. R. 86. But see Bickford v. McComb, 88 Fed. R. 428.

[49] Levis v. Dart, 6 How. 1.

[50] Detweiler v. Holderbaum, 42 Fed. R. 337.

[51] Caldwell v. Taggart, 4 Pet. 190.

son interested, although it did not appear what citizenship he had.[52]

§ 54. When numerous interests have been created for the purpose of preventing the plaintiff from obtaining equitable relief.— When numerous interests had been created for the purpose of preventing a person from obtaining equitable relief, the English courts allowed the persons to whom these interests were thus conveyed to be omitted from the bill, if the original owner of the property thus divided were made a defendant.[1] The rule and the reasons for it are thus stated by Calvert in his valuable work on Parties: "If a party has divided an interest amongst a number of persons for this purpose, the court, in order that the contrivance may be frustrated, and the equitable relief may be obtained, allows the suit to proceed in their absence. Such a division is in reality a fraud; an attempt to defeat justice by converting the general rule of the court into an obstruction to the ordinary proceedings. The court defeats the fraud by refusing to enforce the general rule."[2] Lord Hardwicke said upon this subject: "Where a mortgagee who has a plain redeemable interest makes several conveyances upon trust, in order to entangle the affair, and to render it difficult for a mortgagor or his representatives to redeem, there it is not necessary that the plaintiff should trace out all the persons who have an interest in such trust, to make them parties."[3] This rule might, perhaps, be extended to a case, where an attempt had been made to defeat the jurisdiction of the Federal court by a merely colorable conveyance to a person of the same citizenship as the complainant.[4]

§ 55. When a person consents to the relief sought.— A person who consents to the relief sought, when it is so stated in

[52] Hyde v. Folger, 4 McLean, 255.

§ 54. [1] Calvert on Parties (2d ed.), Book I, ch. IV, p. 61; Yates v. Hambly, 2 Atk. 237. See also Union Bank of Louisiana v. Stafford, 12 How. 327; New Orleans Canal & Banking Co. v. Stafford, 12 How. 343.

[2] Calvert on Parties (2d ed.), 61.

[3] Yates v. Hambly, 2 Atk. 237, 238.

[4] See Union Bank of Louisiana v. Stafford, 12 How. 327; New Orleans Canal & Banking Co. v. Stafford, 12 How. 343: Leather Manufacturers' Bank v. Cooper, 120 U. S. 778, 781.

§ 55. [1] Mechanics' Bank v. Seton, 1 Pet. 299, 306; Calvert on Parties (2d ed.), Book I, ch. V, 69, 84.

[2] Calvert on Parties (2d ed.), Book I, ch. 69; Kirk v. Clarke, Prec. in Ch. 275; Harvey v. Corrie, 4 Russ. 35, 55; Bawtree v. Watson, 3 M. & K. 339, 340.

[3] Vattier v. Hinde, 7 Pet. 252, 258.

[4] Rylands v. Latouche, 2 Bligh, 579.

the bill, need not be joined as a defendant with the other parties interested, unless his presence is indispensable for their protection.[1] Sometimes the plaintiff is required to execute a satisfactory undertaking that the party omitted will conform to the decree.[2] Similarly, a person who disclaims all interest in the subject-matter may also be omitted, unless his joinder is essential to the protection of the rights of the other defendants.[3] An agreement between two persons that one shall represent the other as plaintiff, when the former would otherwise have no right to the relief sought, will not be sanctioned by the court.[4]

§ 56. When the plaintiff waives his right against a person.— "Where a plaintiff," says Lord Hardwicke, "is only concerned in interest, there he may waive his demand, and omit making the party a defendant to his bill."[1] In accordance with this practice, the equity rules provide that "in suits to execute the trusts of a will, it shall not be necessary to make the heir-at-law a party; but the plaintiff shall be at liberty to make the heir-at-law a party when he desires to have the will established against him."[2] Such a waiver cannot, however, be made unless it can be without prejudice to those against whom the bill is filed.[3]

§ 57. When the interest of an absent person is evidently very small.— In England it has been held, in accordance with the maxim *de minimis non curat lex*, that when the interest of an absent person is evidently very small the court will dispense with his presence in the suit.[1] This view seems to be sanctioned by two decisions of the Supreme Court of the United States.[2]

§ 57a. When the absent persons are unknown.— When the absent persons are unknown and it is so stated in the bill, their omission is no defect in the suit until they are discovered,

§ 56. [1] Williams v. Williams, 9 Mod. 299. See also Wilson v. Todd, 1 M. & C. 42, 46; Calvert on Parties (2d ed.), 83, and cases cited.

[2] Rule 50, copied from the 31st Order in Chancery of August, 1841.

[3] Anon., 2 Eq. Cas. Abr. 166, pl. 6; Story's Eq. Pl., § 189.

§ 57. [1] Calvert on Parties (2d ed.), Book I, ch. V, p. 70; Daws v. Benn, 1 J. & W. 513; Attorney-General v. Goddard, 1 T. & R. 348, 350. See also Faulkner v. Daniel, 3 Hare, 199, 213.

[2] Union Bank v. Stafford, 12 How. 327; New Orleans C. & B. Co. v. Stafford, 12 How. 343.

at least when parties with similar rights are parties who may defend in their interest.[1]

§ 58. When the right of administration is in dispute.— The English rule was, that when there was a contest in the Ecclesiastical Court over the right of administration upon a decedent's estate, the omission in a bill affecting that estate of an administrator might be excused if special circumstances were shown.[1] If, however, no proceeding in the Ecclesiastical Court were pending, one must be instituted before the bill could be filed.[2]

§ 59. Relaxation of rule as to parties in special cases.— The rules upon the subject of parties are, however, very loose, and the questions arising under them are decided largely in the discretion of the court.[1] "The necessity for the relaxation of the rule is more especially apparent in the courts of the United States, where, oftentimes, the enforcement of the rule would oust them of their jurisdiction, and deprive parties entitled to the interposition of a court of equity of any remedy whatever."[2] A court of equity adapts its decrees to the necessities of each case; and should a suit brought by a single complainant concerning a matter in which others as well as himself were interested terminate in a decree against the defendants, it is easy to do substantial justice to all the parties in interest, and prevent a multiplicity of suits, by allowing the other persons similarly situated with the plaintiff, "either through a reference to a master, or by some other proper proceeding, to come in and share in the benefit of the litigation."[3] The discretion as to the joinder or omission of parties is, how-

§ 57*a*. [1] Alger v. Anderson, 78 Fed. R. 729, 734.

§ 58. [1] Plunket v. Penson, 2 Atk. 51; Penny v. Watts, 2 Phillips, 149, 154; Calvert on Parties (2d ed.), Book I, ch. V, p. 70.

[2] Penny v. Watts, 2 Phillips, 149, 154; Calvert on Parties (2d ed.), Book I, ch. V. See Reed v. Bennett (N. J. Errors & Appeals, 1897), 37 Atl. R. 75; *supra*, § 45.

§ 59. [1] Cameron v. McRoberts, 3 Wheat. 591; Elmendorf v. Taylor, 10 Wheat. 152, 167; Lewis v. Darling, 16 How. 1; Barney v. Baltimore, 6 Wall. 280; Payne v. Hook, 7 Wall. 425; Barney v. Latham, 103 U. S. 205; Greene v. Sisson, 2 Curtis, 171; West v. Randall, 2 Mason, 181; Parsons v. Howard, 2 Woods, 1; Winter v. Ludlow, 3 Phila. (Pa.) 464.

[2] Mr. Justice Davis in Payne v. Hook, 7 Wall. 425, 432.

[3] Mr. Justice Davis in Payne v. Hook, 7 Wall. 425, 432. See s. c. as Hook v. Payne, 14 Wall. 252; *infra*, § 201.

ever, one which, when properly raised, is subject to review upon appeal.[4] An act of Congress relaxing or extending the rules as to parties in a particular case is constitutional.[5]

§ 60. Restatement of the rules as to parties.— The rules upon the subject may be summarily though roughly stated thus: —

I. All persons, not too numerous, whose joinder will not oust the jurisdiction of the court, and who have any direct interest in obtaining or resisting the relief prayed for in a bill, or granted in a decree which so disposes of the controversy as to prevent any future litigation concerning the same, must be parties to a suit in equity.[1]

II. No person without an interest in the contest or its settlement can be joined as a party, except perhaps the officer or member of a corporation, who according to some authorities may be made a defendant to a bill praying relief against it, in order to compel from him a discovery of facts of which he acquired knowledge in his official capacity.[2]

III. If the persons having a common interest in the subject of the controversy or the question to be decided therein are numerous, they may in certain cases be represented, as plaintiffs or defendants, by others who hold the legal title in trust for them, or by one or more of their number suing, or more rarely being sued, in their behalf.[3]

IV. Persons having a merely formal interest, or an interest so far separable from that of the principal parties that a decree disposing of the controversy as between the latter can be made and enforced without affecting their rights, may always be omitted when, by reason of their residence or citizenship, not within the jurisdiction of the court.[4]

V. All persons who have such an interest in the controversy that a decree cannot be enforced without directly affecting their rights, must be joined as parties; except possibly when they are unknown to the complainants, or when their interest is

[4] Caldwell v. Taggart, 4 Pet. 190; Robertson v. Carson, 19 Wall. 94; Hoe v. Wilson, 9 Wall. 501; Railroad Co. v. Orr, 18 Wall. 471.

[5] U. S. v. Union Pacific R. Co., 98 U. S. 569.

§ 60. [1] §§ 42, 43, 50.

[2] § 43.

[3] §§ 46, 47, 48.

[4] §§ 45, 50, 51, 52.

very small, or has been created for the purpose of depriving the court of jurisdiction.[5]

VI. There is no need of joining as parties any against whom the plaintiffs waive their rights, or who are willing to allow the relief prayed for in the bill, unless their presence is necessary for the protection of those who have been made defendants.[6]

VII. The necessity of the joinder of parties is always in the sound discretion of the court, which adapts itself to the facts of each particular case.[7]

§ 61. Objection for want of parties.—An objection that there is a defect of parties may be taken by demurrer, plea, or answer,[1] or at the hearing; and if the absent persons are indispensable parties, even for the first time upon appeal;[2] although not if a decree has been made which cannot prejudice their interests.[3] "If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having by plea or answer taken the objection, and therein specified by name or description the parties to whom the objection applies, the court (if it shall think fit) shall be at liberty to make a decree saving the rights of absent parties."[4] The usual practice is for the court, if it considers the objection good, to allow the cause to stand over until the plaintiff shall amend his bill by bringing in the additional parties needed.[5] If the omitted parties on account of their citizenship cannot be brought in, the court may retain the bill, and perhaps continue an injunction in accordance with its prayer, until the complainants have had a reasonable time to litigate the matters in controversy between themselves and the omitted parties in a

[5] §§ 53, 54, 57, 57*a*.

[6] §§ 55, 56.

[7] § 59.

§ 61. [1] For the rules regulating the manner of taking the objection, see the chapters on those pleadings.

[2] Hoe v. Wilson, 9 Wall. 501.

[3] §§ 52, 53. See Keller v. Ashford, 133 U. S. 610, 626.

[4] Rule 53. Where a defendant in a suit in equity for the infringement of a patent made objection for the first time at the argument upon final hearing, that there was a defect of parties, because a person holding an equitable title to the patent was not a party; and it appeared that no such issue was made by the pleadings, and that during the taking of the testimony the defendant's counsel admitted that the title to the patent was in the complainant, it was held that the objection was made too late and it was overruled. California El. Works v. Finck, 47 Fed. R. 583. See also Hills v. Putnam, 152 Mass. 123.

[5] Hunt v. Wickliffe, 2 Pet. 201, 215.

court of competent jurisdiction; and if it should then appear by the judgment of such a court that the complainants have in equity a superior title to the omitted parties, proceed to a determination of the rights between the parties to the bill.[6] If, however, the complainant does not within a reasonable time amend his bill, or, if so allowed by the court, proceed against the omitted parties, the court may dismiss his bill; but such dismissal must be without prejudice.[7] "Where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the clerk's order-book, in the form or to the effect following (that is to say): 'set down upon the defendant's objection for want of parties.' And where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order for liberty to amend his bill by adding parties, but the court, if it thinks fit, shall be at liberty to dismiss the bill."[8] A lack of proper parties is not a jurisdictional defect; and therefore, if, pending the decision of the court, upon an objection for the omission of a party whose presence would oust the Circuit Court of jurisdiction, he dies, or his interest ceases, and the defect is thereby cured, the court will retain the bill.[9] It was held, where a defendant had removed a case, that he could not object to the absence of a party whose joinder would deprive the Federal court of jurisdiction.[10]

§ 62. Objection for joinder of improper parties.—If persons are improperly joined as plaintiffs, all the defendants may demur.[1] If a person is joined as a plaintiff without his con-

[6] Mallow v. Hinde, 12 Wheat. 193, 198, 199.

[7] Mallow v. Hinde, 12 Wheat. 193, 199; Hunt v. Wickliffe, 2 Pet. 201, 215.

[8] Rule 52.

[9] Harrison v. Rowan, 4 Wash. C. C. 202, 208; Hinchman v. Paterson H. R. Co., 17 N. J. Eq. 76.

[10] Fisher v. Shropshire, 147 U. S. 133, 145.

§ 62. [1] Cuff v. Platell, 4 Russ. 242; King of Spain v. Machado, 4 Russ. 225; Story's Eq. Pl., § 544.

sent, he may on motion, or petition, upon notice to all parties, have his name stricken out, with costs to be paid by the plaintiff who has improperly brought him into the suit.[2] Such relief has been granted upon petition after a decree for costs against the petitioners and the other persons named as complainants.[3] Where several complainants with a similarity but not a community of interest had joined in a bill, and the presence of some of them deprived the Federal Court of jurisdiction, the one which had the right to sue the defendants there was allowed to amend the bill so as to make the other complainants additional defendants.[4] Where one of several complainants, whose interest is opposed to the others, undertakes to delay, harass, or impede the orderly progress of the cause, the court may order that he be made a defendant.[5] If a person having no interest in the controversy be improperly joined as defendant, he alone can demur,[6] unless the bill is multifarious;[7] and no notice of his demurrer need be given to the other defendants,[8] except in special cases where it is clearly for the latter's interest to retain him in the suit. If a misjoinder is apparent on the face of the bill it is more prudent to demur. If such an objection is not made till the hearing, the court may disregard it.[9] It cannot be raised for the first time upon appeal.[10] When a demurrer is sustained in favor of defendants improp-

[2] Calvert on Parties (2d ed.), 430; Keppell v. Bailey, 2 M. & K. 517; Titterton v. Osborne, 1 Dickens, 350; Wilson v. Wilson, 1 J. & W. 459. It was held that a motion to dismiss the bill upon that ground should be denied. Southern Life Ins. Co. v. Lanier, 5 Fla. 110.

[3] McGeorge v. Bigstone Gap Imp. Co., 86 Fed. R. 599.

[4] Insurance Co. of N. A. v. Svendsen, 74 Fed. R. 346. See Aylwus v. Bray, 2 Y. & Jer. 518, note.

[5] Lalance & G. Mfg. Co. v. Haberman Mfg. Co., 93 Fed. R. 197, 199. As to the change of a defendant to a plaintiff, see Guinn v. Lee, 6 Pa. Super. Ct. 646.

[6] Whitbeck v. Edgar, 2 Barb. Ch. (N. Y.) 106; Seymour v. Freer, 8 Wall. 202, 218; Buerk v. Imhaeuser, 8 Fed. R. 457; Mitzhener v. Robins (Miss.), 19 S. R. 103.

[7] Cherry v. Meuro, 2 Barb. Ch. 610; *infra*, § 73.

[8] Anon., 9 Ves. 512; Hodson v. Ball, 11 Simons, 459; Calvert on Parties (2d ed.), 430.

[9] Story v. Livingston, 13 Pet. 359; Eades v. Harris, 1 Y. & C. N. R. 235; Raffety v. King, 1 Keen. 601; Mosley v. Taylor, cited in 1 Keen. 601; s. c., 3 Y. & J. 520; Calvert on Parties (2d ed.), 156; Story's Eq. Pl., § 544.

[10] Livingston v. Woodworth, 15 How. 546; Hayes v. Pratt, 147 U. S. 557, 570.

erly joined as having no interest in the controversy, the plaintiff will always be allowed to amend by striking out their names.[11] If the bill is dismissed for a misjoinder of complainants and one of them appears to have a good cause for equitable relief, the dismissal must be without prejudice.[12] The subject of misjoinder is discussed in the next chapter under the head of "Multifariousness." [13]

[11] Tryon v. Westminster Improvement Comm'rs, 6 Jurist (N. S.), 1324.

[12] House v. Mullen, 22 Wall. 42.

[13] *Infra*, §§ 71–75.

CHAPTER IV.

BILLS.

§ 63. Informations.—The first proceeding in a suit in equity is the preparation and filing of the first pleading. This was either an information, a bill, or an information and bill. In England the attorney-general or solicitor-general could file an information on behalf of the crown, or of those who either as idiots and lunatics partook of its prerogative, or whose rights, as those in charities, were under its particular protection. The law officers of the royal consort had the same right. If the suit did not immediately concern the rights of the crown, a relator, who sustained and directed the litigation, who it seems might prevent the discontinuance of the suit by the Attorney-General without his consent, and who was responsible for the costs, was usually joined with the officer in whose name it was filed. The main distinction between an information and a bill was that, whereas the latter was in the form of a petition to the court, in the former the officer that filed it stated the case by way not of petition or complaint, but of information to the court of the rights which the crown claimed on behalf of itself or others, and of the invasion or detention of those rights for which the suit is instituted. If the relator had a personal interest in the relief sought, his personal complaint was joined to and incorporated with the information given to the court by the officer of the crown; and the pleading was termed an information and bill.[1] The proceedings upon an information could only abate by the death or determination of interest of the defendant. If, however, the information were filed at the instance of one or more relators and all died, the court would not allow the cause to proceed till an order had been obtained giving leave to insert the name of a new relator, and one had

§ 63. [1] Mitford's Pl., ch. 1; Story's Eq. Pl., § 8; People v. North San Francisco Ass'n, 38 Cal. 564; Attorney-General v. Delaware & H. R. Co., 27 N. J. Eq. 1; s. c., 27 N. J. Eq. 631; Newark Aqueduct Board v. Parson, 45 N. J. Eq. 394.

been inserted accordingly. Otherwise, proceedings upon informations were substantially the same as upon bills, except that great laxity of practice was permitted when informations were filed on behalf of charities.[2] In the courts of the United States it has been held to be the proper practice for the government to sue in equity in its own name by a bill similar to one filed by a private citizen;[3] but a pleading styled an information filed on behalf of the United States, being in substance a bill, was sustained as such,[4] and so was one filed on behalf of the United States in his own name by the district attorney for the northern district of New York.[5] In the suit brought by the State of Florida against the State of Georgia to settle the boundary between them, the Attorney-General of the United States was permitted to file an information praying "that he be permitted to appear in said case, and be heard in behalf of the United States, in such time and form as the court shall order;" and although permission for him to take testimony in the name of Florida with its consent was refused, it was "ordered that the Attorney-General have leave to adduce evidence, whether written or parol, and to examine witnesses and file their depositions in order to establish the boundary claimed by the United States."[6] Informations have, however, been filed in equity in the courts of some of the individual States. These have been usually to abate public nuisances,[7] but one case was allowed to protect a charity which had no person directly interested qualified to defend its rights.[8] A State chancellor refused to entertain an information filed in the name of the State Attorney-General on the relation of an alleged imbecile to set aside a conveyance; but he allowed the paper to be converted by

[2] Mitford's Pl., ch. 1; Story's Eq. Pl., § 8.

[3] Benton v. Woolsey, 12 Pet. 27; U. S. v. Hughes, 11 How. 552, 568; s. c. as Hughes v. U. S., 4 Wall. 232; Miss. & Mo. R. Co. v. Ward, 2 Black, 485, 492; U. S. v. Union Pac. R. Co., 98 U. S. 569; Moffat v. U. S., 112 U. S. 24; U. S. v. Minor, 114 U. S. 233; U. S. v. Am. Bell Tel. Co., 128 U. S. 316; *infra*, § 76.

[4] U. S. v. Hughes, 11 How. 552, 568; s. c. as Hughes v. U. S., 4 Wall. 232. See Benton v. Woolsey, 12 Pet. 27.

[5] Benton v. Woolsey, 12 Pet. 27.

[6] Florida v. Georgia, 17 How. 478, 480, 523.

[7] Attorney-General v. Jamaica P. Aq. Co., 133 Mass. 361; Attorney-General v. Hare, 50 Mich. 447; Attorney-General v. Delaware & B. B. R. Co., 27 N. J. Eq. 1; s. c., 27 N. J. Eq. 631.

[8] Attorney-General v. Butler, 123 Mass. 306.

amendment into a bill filed by the next friend of the alleged imbecile.[9] A State sues in a court of the United States by a bill in equity in its own name.[10] "When the United States comes into a court of equity as a suitor it is subject to the defenses peculiar to that court."[11] Such an information or bill should be filed in the name of the United States, not in the name of one of its law officers.[12]

§ 64. **Definition and classification of bills.**— The usual course, and the only one open to a private citizen, is the filing of a bill. The word "bill" is derived from the Latin *libellus;* and such a pleading is sometimes called an English bill; because at the time when pleadings at common law were in Law Latin or Law French, it was as now written in the English language.[1] A bill is a petition addressed to the judges of a court of equity, containing a statement of the facts which in the plaintiff's opinion give him a right to sue, and concluding with a prayer for the relief to which he deems himself entitled.

> Quis, quid, coram quo, quo jure petatur, et a quo,
> Recte compositus quisque libellus habet.[2]

Bills are divided by the books into three classes: original bills, bills not original, and bills in the nature of original bills. A fourth class, which may be termed original bills in the nature of bills not original, is recognized by the Federal courts. Original bills are those which relate to some matter not before litigated in the court at equity by the same parties standing in the same interests. Bills not original are those which relate to some matter already litigated in the court at equity by the same parties, or their representatives, and which are either an addition to or a continuance of an original bill, or both.[3] Bills in the nature of original bills are those which serve to bring before the court the proceedings and decree in a former suit, for the purpose of either obtaining the benefit of the same or procuring the reversal of the decision made therein.[4] Original bills in the nature of bills not original are those having all the

[9] Thompson v. Thompson, 6 Houston (Del.), 225.

[10] *Supra*, § 14.

[11] U. S. v. White, 17 Fed. R. 561, 565.

[12] Benton v. Woolsey, 12 Pet. 27.

§ 64. [1] Story's Eq. Pl., § 7.

[2] Com. Dig., Chancery, E. 2; Story's Eq. Pl., § 25.

[3] Quoted with approval in Anglo-Florida Phosphate Co. v. McKibben (C. C. A.), 65 Fed. R. 529, 530, 531.

[4] Mitford's Pl., ch. 1, § 2; Story's Eq. Pl., § 16.

characteristics of original bills, except that the Federal courts will take jurisdiction of them without regard to the citizenship of the parties, or the other limitations of the original Federal jurisdiction.[5] Original bills are of two kinds: those which pray relief, and those which do not pray relief. Original bills which pray relief are said to belong to three classes: bills which pray the decree of the court concerning some right claimed by the plaintiff in opposition to some right claimed by the defendant, bills of interpleader, and bills of *certiorari*. Original bills not praying relief are of two kinds: bills to perpetuate the testimony of witnesses, and bills of discovery. Bills not original are bills of revivor, supplemental bills, and bills of revivor and supplement. Bills in the nature of original bills are bills in the nature of supplemental bills, bills in the nature of bills of revivor, cross-bills, bills of review, bills impeaching decrees upon the ground of fraud, bills to suspend the operation of decrees on special circumstances or to avoid them on the ground of matter subsequent, and bills partaking of the qualities of some one or more of these bills.[6] If the court has jurisdiction of an original bill, it will take jurisdiction of bills not original, and bills in the nature of original bills growing out of the first suit, without regard to the citizenship of the parties thereto.[7] And in certain other cases it will take jurisdiction of bills otherwise original which are so intimately connected with matters before the Federal court that it is in the interest of convenience and justice to have them disposed of before the same tribunal.[8] These may be named original bills in the nature of bills not original. Such is a bill to obtain a judicial construction of previous decrees;[9] a bill to obtain a determination of the rights of a claimant to a fund in the hands of a Federal marshal;[10] a bill to stay proceedings at law;[11] and a bill to set

[5] Minnesota Co. v. St. Paul Co., 2 Wall. 609; Krippendorf v. Hyde, 110 U. S. 276; Pacific R. Co. of Mo. v. Mo. Pac. Ry. Co., 111 U. S. 505; Continental Tr. Co. v. Toledo, St. L. & K. C. R. Co., 82 Fed. R. 642; *supra*, § 21.

[6] Mitford's Pl., ch. 1, § 2; Story's Eq. Pl., §§ 16-24.

[7] Clarke v. Mathewson, 12 Pet. 164; Jones v. Andrews, 10 Wall. 327, 333; Pacific R. Co. of Mo. v. Mo. Pac. Ry. Co., 111 U. S. 505. See § 21.

[8] Minnesota Co. v. St. Paul Co., 2 Wall. 609. See § 21.

[9] Ibid.

[10] Krippendorf v. Hyde, 110 U. S. 276; Freeman v. Howe, 24 How. 450.

[11] Logan v. Patrick, 5 Cranch, 288;

aside a decree.[12] The peculiarities in the form and the procedure upon original bills not praying relief, bills not original, and bills in the nature of original bills, will be discussed in the latter part of this work. In this chapter, the form of original bills praying relief and, in the chapters immediately succeeding, the proceedings upon them, will be explained, beginning with the ordinary kind,— bills which seek relief concerning some right claimed by the plaintiff in opposition to one claimed by the defendant.

§ 65. Frame of a bill in equity.— Formerly, bills usually consisted of nine parts: the direction or address, the introduction, the premises or stating part, the common-confederacy clause, the charging part, the jurisdiction clause, the interrogating part, the prayer of relief, and the prayer of process.[1] Of these, however, the common-confederacy clause, alleging that the defendant or defendants are combining and confederating with some persons to the plaintiff unknown, whose names when discovered he prays leave to insert as defendants, which owed its origin to an idea that otherwise the bill could not be amended so as to add new defendants, and its retention to the practice of taxing costs according to the length of the documents filed; the charging part, alleging the defense which it anticipated would be made by the defendant, and the reply which the plaintiff intended to make thereto; and the jurisdiction clause, alleging that the acts of the defendant which were complained of were contrary to equity, and that the plaintiff was without any remedy at law: were not even then considered necessary by the best authorities,[2] and by the equity rules they have been expressly declared superfluous.[3]

§ 66. The address and introduction.— In England, a bill in chancery was required to be addressed to the person having the custody of the great seal, usually either the sovereign, or the Lord Chancellor, except when the Lord Chancellor himself was the complainant, when it was addressed to the sovereign

Dunn v. Clarke, 8 Pet. 1; Jones v. Andrews, 10 Wall. 327, 333; Dunlap v. Stetson, 4 Mason, 349.

[12] Pacific R. Co. of Mo. v. Mo. Pac. Ry. Co., 111 U. S. 505.

§ 65. [1] Mitford's Pl., ch. 1, § 3; Story's Eq. Pl., §§ 26–48.

[2] Mitford's Pl., ch. 1, § 3; Langdell's Eq. Pl., § 55; Story's Eq. Pl., §§ 29, 32, 33, 34; Comstock v. Herron, 45 Fed. R. 660.

[3] Rule 21.

"in his high court of chancery."[1] In the United States, as a great seal is not, as in England, essential to the validity of writs in equity, a bill is addressed to the judge or judges of the court where it is filed.[2] The introduction formerly contained the names, descriptions, and residences of the complainants, together with the character in which they sued, if in a representative capacity, and such other allegations as were necessary to found the jurisdiction of the court.[3] Sometimes the names and descriptions of the defendants were also here inserted, but it was more usual to name them in the next part of the bill.[4] The equity rules regulate the subject as follows: "Every bill in the introductory part thereof shall contain the names, places of abode, and citizenship of all the parties, plaintiffs and defendants, by and against whom the bill is brought. The form, in substance, shall be as follows: 'To the judges of the Circuit Court of the United States for the district of ——: A. B., of ——, and a citizen of the State of ——, brings this his bill against C. D., of ——, and a citizen of the State of ——, and E. F., of ——, and a citizen of the State of ——. And thereupon your orator complains and says that,' etc."[5]

An allegation of residence without an allegation of citizenship is insufficient.[6] If one of the parties is a corporation, the bill must state by or under the laws of what State it was created, and its members will then be conclusively presumed to be citizens of that State.[7] An allegation that a corporation is a citizen of ——,[8] or that it is "duly established by a law, having its principal place of business"[9] in a specified State, is insufficient. The pleading must allege that it was created by or under the

§ 66. [1] Mitford's Pl., ch. 1, § 3; Story's Eq. Pl., § 26.

[2] Rule 20.

[3] Mitford's Pl., ch. 1, § 3; Story's Eq. Pl. § 26.

[4] Story's Eq. Pl., § 26. *Contra*, Leavenworth v. Pepper, 32 Fed. R. 718.

[5] Rule 20; U. S. v. Pratt C. & C. Co., 18 Fed. R. 708; § 69. Where there are two districts in a State the bill must show in which district a party resides. Harvey v. Richmond & M. Ry. Co., 64 Fed. R. 19.

[6] Tug River C. & S. Co. v. Brigel, 67 Fed. R. 625; Robertson v. Cease, 97 U. S. 646; Pacific Postal Tel. Co. v. Irvine, 49 Fed. R. 118.

[7] Lafayette Ins. Co. v. French, 18 How. 404; Muller v. Dows, 94 U. S. 444; Steamship Co. v. Tugman, 106 U. S. 118.

[8] Lonergan v. Illinois Cent. R. Co., 55 Fed. R. 550; American S. R. Co. v. Johnson, 60 Fed. R. 503; *infra*, § 885.

[9] N. Y. & N. E. R. Co. v. Hyde (C. C. A.), 56 Fed. R. 188, 191.

laws of such State,[10] or at least that it was organized[11] under the laws thereof. If one of the parties is an alien, the bill should aver that he is "a citizen and subject of a foreign State," specifying that State's name.[12] Where a bill or a common-law pleading is filed or served subsequent to the commencement of the suit, it should aver the citizenship of the parties at the time the suit was commenced as well as in the present tense.[13] An allegation, that the State of which a party is a citizen is unknown, is insufficient when the jurisdiction is claimed for difference of citizenship.[14] How advantage could be taken of an omission in the introduction of the residence of the parties, whether by demurrer or simply by a motion for security for costs, was, under the old practice, a doubtful question.[15] It has been held that a bill founded on the patent laws is not demurrable for a failure to state the defendant's residence.[16] The bill is certainly demurrable if enough does not appear upon its face to show the court's jurisdiction.[17] It has been suggested that a defect in this respect in the introductory part of a bill is, it seems, not cured by an allegation in its title or caption.[18] It has been said that no one can be made a defendant under a fictitious name;[19] but in an English case where the parents of an infant, who was a necessary defendant to a bill, refused to have her baptized in order to interpose difficulties in the plaintiff's way, Sir John Leach ordered that she should be described as the youngest female child of A. B. (naming her father) and C. D. (naming her mother).[20] Although this part of the bill should contain the statement that the complainant sues on behalf of others as well as himself, if he intends so to do, it has

[10] Lonergan v. Illinois Cent. R. Co., 55 Fed. R. 550.

[11] Ward v. Blake Mfg. Co. (C. C. A.), 56 Fed. R. 437.

[12] Wilson v. City Bank, 3 Sumner, 422.

[13] Lackey v. Newton Min. Co., 56 Fed. R. 628.

[14] Tug River C. & S. Co. v. Brigel, 67 Fed. R. 625.

[15] Rowley v. Eccles, 1 Sim. & S. 511; Daniell's Ch. Pr. (2d Am. ed.) 409.

[16] Vermont Mach. Co. v. Gibson, 50 Fed. R. 283.

[17] Bingham v. Cabot, 3 Dall. 382; Jackson v. Ashton, 8 Pet. 148; U. S. v. Pratt C. & C. Co., 18 Fed. R. 708; Lackey v. Newton Min. Co., 50 Fed. R. 634.

[18] Jackson v. Ashton, 8 Pet. 148. See Sharon v. Hill, 23 Fed. R. 853; Railway Co. v. Ramsey, 22 Wall. 322; Berger v. Sperry, 95 U. S. 401; Robertson v. Cease, 97 U. S. 646; Gordon v. Third Nat. Bank, 144 U. S. 97.

[19] Kentucky S. Mining Co. v. Day, 2 Sawyer C. C. 468.

[20] Ely v. Broughton, 2 Sim. & S. 188.

been suggested that this might not be necessary when his case is founded upon a statute "which itself gives that force and direction to the bill."[21]

§ 67. The narrative part of a bill.—The most important portion of a bill in equity is the narrative or stating part. This contains the plaintiff's cause of action. "It should set forth the plaintiff's case in a clear and distinct narrative, with the facts relied upon as the basis of the suit. For convenience, each paragraph should be numbered, so that the successive allegations may be readily referred to.[1] The object of old common-law pleading was to bring the matter in controversy to certain distinct issues. In equity pleading no such attempt is made. The statement of the plaintiff's case in the bill differs little in language or form from any other statement of facts which might be drawn up for the information of third parties, say an application to a government board. The defendant's answer usually admits, or denies, or qualifies *seriatim* each statement in the bill; and occasionally, before proceeding to notice the statement in detail, the defendant gives a general history of the case from his own point of view. The issues, both of fact and of law, are thus often involved in large masses of statement, and have to be selected, so to speak, by the judge who tries the cause, with the assistance of the arguments of counsel. It would be difficult to imagine a less technical document than a bill in equity."[2] The bill must contain every fact essential to the plaintiff's cause of action. For no evidence will be admitted or considered to prove any fact not alleged in it.[3] It must plead every fact essential to the rights of the plaintiff, and necessarily within his knowledge, positively, not upon information and belief,[4] and with certainty.[5] Otherwise, it is

[21] Irons v. Manufacturers' Nat. Bank, 17 Fed. R. 808.

§ 67. [1] An omission to do this will not be a defect in pleading.

[2] Lectures before the Law School of Boston University on Equity Pleading by Judge Dwight Foster, MS. See Hayne Eq. 70.

[3] Gordon v. Gordon, 3 Swanst. 400, 472; Miller v. Cotten, 5 Ga. 341, 346; Wilson v. Stolley, 4 McLean, 275; Crocket v. Lee, 7 Wheat. 522; Jackson v. Ashton, 8 Pet. 148; Henry v. Suttle, 42 Fed. R. 91. See ch. XII on Amendments.

[4] Lord Uxbridge v. Staveland, 1 Ves. Sen. 56; Egremont v. Cowell, 5 Beav. 620; Mitford's Pl. 40; Story's Eq. Pl., §§ 255, 256.

[5] Harrison v. Dixon, 9 Pet. 483, 503; Wormald v. De Lisle, 3 Beav. 18; Brooks & Hardy v. O'Hara Brothers, 8 Fed. R. 529; Daniell's Ch. Pr. (2d Am. ed.) 421–425; *infra*, § 69.

demurrable. An allegation that an event occurred on or about a certain specified day is, however, sufficient.[6] Less certainty is required concerning facts of which a discovery is sought from the defendant.[7] And facts not necessarily in the complainant's knowledge he may allege "as your orator is informed and believes, and therefore avers."[8]

§ 68. **Scandal and impertinence.**— "Every bill shall be expressed in as brief and succinct terms as it reasonably can be and shall contain no unnecessary recitals of deeds, documents, contracts, or other instruments, *in hæc verba*, or any other impertinent matter, or any scandalous matter not relevant to the suit."[1] "Facts not material to the decision are impertinent, and if reproachful they are scandalous; and, perhaps, the best test by which to ascertain whether the matter be impertinent is to try whether the subject of the allegation could be put in issue, and would be matter proper to be given in evidence between the parties."[2] It is customary in bills seeking the protection or enforcement of rights depending upon complicated provisions of Federal or State statutes, to set forth such statutes either at length or according to their legal effect; and when the complainant depends upon historical facts, of which the court will take judicial notice, to state such facts also. Sometimes former decisions of the courts are similarly pleaded. Although this practice is not strictly correct, it is still convenient for the court as well as counsel, inasmuch as the case made by the bill is thereby made more easy of comprehension. It seems that exceptions to such allegations for impertinence cannot be sustained.[3] Needless repetitions are imperti-

[6] Richards v. Evans, 1 Ves. Sen. 39; Roberts v. Williams, 12 East, 33, 37; Leigh v. Leigh, Daniell's Ch. Pr. 369.

[7] Towle v. Pierce, 12 Met. (Mass.) 329, 332; Lafayette Co. v. Neely, 21 Fed. R. 738.

[8] Coryell v. Klehn, 157 Ill. 462; s. c., 41 N. E. R. 64; Wyckoff v. Wagner T. Co., 88 Fed. R. 515. An allegation "as your orator is informed and believes" is insufficient. Ibid. So is an allegation upon belief. Rubber T. Co. v. Davie, 100 Fed. R. 85. But see Leavenworth v. Pepper, 32 Fed. R. 718; Kelley v. Boettcher (C. C. A.), 85 Fed. R. 553; Curran v. Campion, 85 Fed. R. 67.

§ 68. [1] Rule 26.

[2] Chancellor Kent in Woods v. Morrell, 1 J. Ch. (N. Y.) 103, at p. 106. See also Hood v. Inman, 4 J. Ch. (N. Y.) 437. For an illustration of scandal, see the record in U. S. v. Schurz, 102 U. S. 378.

[3] Wells v. Oregon Ry. & N. Co., 15 Fed. R. 561; s. c., 8 Sawyer, 600; Allen v. O'Donald, 23 Fed. R. 573; Steam Gauge & Lantern Co. v. Mc-

nent.[4] If a bill contains scandalous or impertinent matter, "it may, on exceptions, be referred to a master by any judge of the court, for impertinence or scandal; and if so found by him, the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the court or a judge thereof shall otherwise order. If the master shall report that the bill is not scandalous or impertinent, the plaintiff shall be entitled to all costs occasioned by the reference."[5] "No order shall be made by any judge for referring any bill, answer, or pleading, or other matter or proceeding depending before the court, for scandal or impertinence, unless exceptions are taken in writing and signed by counsel, describing the particular passages which are considered to be scandalous or impertinent; nor unless the exceptions shall be filed on or before the next rule-day after the process on the bill shall be returnable, or after the answer or pleading is filed. And such order when obtained shall be considered as abandoned, unless the party obtaining the order shall, without any unnecessary delay, procure the

Roberts, 26 Fed. R. 765. In a bill to enjoin the enforcement of an order of a State railroad commission for the reduction of railroad charges, an allegation that the reduction was made at the instance of the governor who was not a member of the commission; and quotations from his message to the legislature, and averments that he had in an address to the commission attacked a decision of the Supreme Court of the United States in violent language, were all held to be impertinent; but a statement of the action of the defendant's predecessors upon the same subject, and of the defendant's inaction against other railroad companies, was held to be relevant and not impertinent. Wilmington & W. R. Co. v. Board of R. Com'rs, 90 Fed. R. 33. See Einstein v. Schnebley, 89 Fed. R. 540. Upon a bill to restrain the infringement of a patent, averments as to decrees obtained by consent against strangers to the suit, and as to interference proceedings in the Patent Office with which defendants were not connected, were held to be impertinent. Western El. Co. v. Williams, Abbott El. Co., 83 Fed. R. 842.

[4] Kelly v. Boettcher, 85 Fed. R. 55, 60; Norton v. Woods, 5 Paige (N. Y.), 260; Camden & A. R. Co. v. Stewart, 19 N. J. Eq. 343; Nevada Nickel Syndicate v. National N. Co., 86 Fed. R. 486. Allegations that a trustee was actuated by corrupt and improper motives are not scandalous or impertinent in a suit by the beneficiaries to remove him. Portsmouth v. Fellows, 5 Mass. 450. In a bill to remove the directors of a bank for paying a loss resulting from an illegal loan made by the officers, it was held proper to allege the previous unlawful management of the bank. Wilkinson v. Dodd, 42 N. J. Eq. 234; s. c. as Dodd v. Wilkinson, 42 N. J. Eq. 647.

[5] Rule 26.

master to examine and report for the same on or before the next succeeding rule-day, or the master shall certify that further time is necessary for him to complete the examination."[6] It has been held in England that a person not a party to the suit may, by leave of the court, file exceptions to a bill for scandalous matter reflecting upon himself.[7] The court may of its own motion expunge scandalous matter at any time.[8] Exceptions to a bill for impertinence cannot, however, be taken after answer.[9] It has been intimated in England that an examiner might be made to pay the costs incurred by his taking down an impertinent answer by a witness.[10] Neither scandal nor impertinence, however gross, is a ground for demurrer, it being a maxim of pleading that *utile per inutile non vitiatur*.[11] It has been said that an exception for impertinence must be allowed in whole or not at all.[12]

§ 69. Certainty.— A bill must state the plaintiff's case with sufficient certainty.[1] The bill must state facts, not conclusions

[6] Rule 27. See Camden & A. R. Co. v. Stewart, 19 N. J. Eq. 343.

[7] Williams v. Douglas, 5 Beav. 82; Daniell's Ch. Pr. (2d Am. ed.) 402.

[8] Kelly v. Boettcher, 85 Fed. R. 55; Ex parte Simpson, 15 Ves. 476; Daniell's Ch. Pr. (2d Am. ed.) 402, 403; Story's Eq. Pl., § 270. See also Langdon v. Goddard, 3 Story, 13.

[9] Story's Eq. Pl., § 270.

[10] Camden & A. R. Co. v. Stewart, 19 N. J. Eq. 343, 346. But see *infra*, § 284.

[11] Daniell's Ch. Pr. (2d Am. ed.) 401. See also Pacific R. of Mo. v. Mo. Pac. Ry. Co., 111 U. S. 505, 516, 522.

[12] Chapman v. School District, Deady, 108, 117, per Deady, J. For scandal and impertinence in answers, see *infra*, § 147.

§ 69. [1] Thus a bill by a receiver of a national bank to recover for the loss caused to it by the negligence of its directors, which prays relief against the persons who acted as directors during various periods of time, together with the representatives of such as are dead, must "state the dates of the losses sustained by the corporation and the dates of the acts or omissions contributing to those losses, with sufficient certainty to inform each of the defendants with which and how many of the losses it is sought to charge him." Price v. Coleman, 21 Fed. R. 357. For an insufficient allegation that plaintiff was a *bona fide* purchaser of a note before its maturity, see Caesar v. Capell, 83 Fed. R. 409. For a lack of certainty in allegations concerning the assignment of a patent, see Jaros H. U. Co. v. Fleece H. U. Co., 60 Fed. R. 622. A bill to enjoin the enforcement as a lien upon land of a judgment entered a few days after complainant had begun to erect a building upon such land under a contract which he claimed gave him priority under a mechanic's lien, was held demurrable for lack of certainty because it failed to set forth "the actual dates at which he commenced, carried on, and finished work and labor, and the actual dates on which he furnished materials," in order that the court might determine the validity and extent and right to priority

of law, which will be disregarded by the court.[2] Thus, a general charge of fraud is not sufficient, but it must allege the specific acts or language which constitute the fraud.[3] All the evidence of the fraud need not be pleaded.[4] It is sufficient if the main facts or incidents which constitute the fraud against which relief is desired are fairly stated so as to put the defendant upon his guard and apprise him of what answer may be required of him.[5] An allegation of a fraudulent intent was held to be an allegation of a fact.[6] A bill for relief from an

of the lien he claimed. McKee v. Travelers' Ins. Co., 41 Fed. R. 117, 119.

An allegation that a song formed a material part of a dramatic composition was held fatally indefinite because it failed to say whether the pleader intended merely the words of the song, which were set out in the bill, or also the music to which they were sung. Henderson v. Tompkins, 60 Fed. R. 758, 765.

[2] Harper v. Hill, 35 Miss. 63.

[3] Gilbert v. Lewis, 1 De G. J. & Sm. 38, 49; Bryan v. Spruill, 4 Jones Eq. (N. C.), 27; U. S. v. Atherton, 102 U. S. 372; U. S. v. Norsch, 42 Fed. R. 417. But see Field v. Hastings & Bradley Co., 65 Fed. R. 279; Kittel v. Augusta, T. & G. R. Co., 65 Fed. R. 859; Patton v. Glatz, 56 Fed. R. 367. See *infra*, § 106. A bill to set aside a decree for fraud must specifically state the manner in which the imposition was practiced upon the court. U. S. v. Norsch, 42 Fed. R. 417. A bill to set aside a land patent on account of fraud or mistake must state the particulars of the fraud, the names of those engaged therein, the officers who were deceived and the manner in which the mistake occurred. U. S. v. Atherton, 102 U. S. 372. But see U. S. v. Am. Bell Tel. Co., 128 U. S. 315.

A bill to enjoin the erection of a county vault, which avers that the commissioners who let the contract "were imposed upon by false and fraudulent representation made to them by . . . the contractor and carpenter, as to the character, quality, and cost of the material of said vault," does not show with sufficient definiteness what representations were made; and an averment "that said contract or agreement was made by collusion or agreement between said A. and co-respondents, or some of them, in order to give said A. an undue advantage in the erection of the vault over any other persons, to the great damage and injury of the county," is insufficient as failing to set out the facts constituting collusion. Hays v. Alrichs, 115 Ala. 239; s. c., 22 S. R. 465. See Moore v. Hawkins, 19 How. 69.

[4] U. S. v. Am. Bell Tel. Co., 128 U. S. 315, 316. It has been held that a creditor's bill for an injunction and a receiver, because of the fraudulent disposition of assets, need not describe the assets. Shainwald v. Lewis, 6 Fed. R. 766, 775.

[5] U. S. v. Am. Bell Tel. Co., 128 U. S. 315, 316.

[6] Platt v. Mead, 9 Fed. R. 91. In a suit for a conveyance of land, it was held to be sufficient to allege that the defendant, while plaintiff's agent, proposed that she convey the property to him for the purposes of its management, and promised that he would reconvey it upon demand, which promise he then had no intention of performing, but made in order to fraudulently procure the land; and that she was induced by his

old fraud must state the time of the discovery of the fraud, the reason why it was not discovered earlier, the means used by the defendant to conceal it, the manner in which it was learned, and the diligence with which the transaction was investigated.[7] A general allegation of concealment and igno-

promise and representations to make the transfer. Alaniz v. Casenave, 91 Cal. 41. See also Tyler v. Savage, 143 U. S. 79; Peck v. Vinson, 124 Ind. 12; Lawrence v. Gayetty, 78 Cal. 126. An averment that one B. was from infancy of unsound mind, and that his mother and her legal adviser procured a deed from him for a grossly inadequate consideration, which was never paid, is a sufficient averment of fraud. Rhino v. Emery (C. C. A.), 72 Fed. R. 382.

The allegation that a decedent, when very feeble both in mind and body, was persuaded and induced through some undue and improper influence, unknown to complainants, to execute a deed, was held to be insufficient. Jackson v. Rowell, 87 Ala. 685. But see Mott v. Mott, 68 N. Y. 246; s. c., 22 Atl. R. 797, cited *infra*, § 70.

A bill alleged "that the bank was insolvent on the 5th day of May; that this was well known to its officers; that it wrongfully neglected to disclose its insolvency to complainant, and, by continuing business and otherwise, represented to complainant and all other persons dealing with it, that it was solvent; that complainant, on the faith of these representations, believed such to be the fact, without suspicion that the bank was, or was in danger of becoming, insolvent; that, acting upon the representations, and relying on the bank's solvency, complainant delivered the draft; that next morning the bank closed its doors, and the draft was collected thereafter; and that, by reason of the premises, the draft or its proceeds did not become the property of the bank." These allegations were held sufficient to charge fraud. "The omission to state in the pleading the degree of insolvency which rendered the bank's conduct fraudulent was not fatal, as the conclusion asserted showed the intention of the pleader." St. Louis & S. F. Ry. Co. v. Johnson, 133 U. S. 566, 577, 578.

On a bill against the officers of a bank for damages caused by the bad management of its affairs, it was held that specific allegations, which in themselves might not be sufficient, when supported by general allegations of misconduct and negligence, made out a case for relief. Ackerman v. Halsey, 37 N. J. Eq. 336; s. c., 38 N. J. Eq. 501.

A bill by a stockholder seeking dissolution of a corporation and accounting, alleged that business had been suspended, "among other things," because of the worthlessness of a patent under which it had been carried on, but without stating that that was the controlling reason; that the officers were misapplying the funds, but without stating that any effort had been made to have the corporation bring suit; that the officers had tampered with the books, but without stating in what manner; that certain assets had not been entered in the books, but without charging concealment or intentional wrong. It was held that the allegations were too general and indefinite to justify granting relief. Watson v. U. S. Sugar Refinery (C. C. A.), 68 Fed. R. 769.

[7] Badger v. Badger, 2 Wall. 95;

rance is insufficient.[8] It is insufficient to allege that the defendant is a trustee, without stating the facts that show how the trust arose.[9] An allegation that a defendant corporation is about to exceed its powers is insufficient. The bill must show what acts are threatened, and why they exceed the powers of the corporation.[10] It has been said that as much certainty is required in a bill by a stockholder to enforce a corporate right as in a bill by the corporation for the same purpose.[11] "The pleader should state the facts, and not formulate mere epithetic 'charges.' . . . If the facts are not to be ascertained by diligence, or because of some obstruction, or if the evidence of them is in possession of the other side, this should be made to appear, with technical averments showing the necessity of discovery, when that is wanted; but a court cannot sustain a bill upon mere denunciatory statements of the plaintiff's suspicions or belief. The best pleadings are those which state the inculpatory facts that carry with them their own conviction of the fraud, and by which the wrongdoing appears, without much necessity for characterizing it as such."[12]

The bill should usually state facts and not evidence.[13] The English rule was that no admissions, whether written or oral, could be given in evidence unless they had been specifically charged in the bill.[14] In this country, however, though the point has never been decided by the Supreme Court, we have the authority of Judge Story, holding that such a practice is unnecessary.[15] So, according to Professor Langdell, "when a bill charges a defendant with having had notice, or with having committed a fraud, or with insanity, or drunkenness, or

Hubbard v. Manhattan Trust Co. (C. C. A.), 87 Fed. R. 51. See Bangs v. Loveridge, 60 Fed. R. 963.

[8] Ibid. Where, as an excuse for laches, it is alleged that negotiations were pending from which plaintiff hoped to obtain a settlement, the bill should allege that his adversary encouraged such hope. Mackall v. Casilear, 137 U. S. 556, 567.

[9] Evan v. Avon, 29 Beav. 144.

[10] Leo v. Union Pac. Ry. Co., 19 Fed. R. 283.

[11] Whitney v. Fairbanks, 54 Fed. R. 985.

[12] Lafayette Co. v. Neely, 21 Fed. R. 738.

[13] Note 4, *supra*.

[14] Hall v. Maltby, 6 Price, 240; Evans v. Bicknell, 6 Ves. 183; Austin v. Chambers, 6 Cl. & Fin. 38; Story's Eq. Pl. 265.

[15] Smith v. Burnham, 2 Sumn. C. C. 612; Jenkins v. Eldredge, 3 Story C. C. 181, 283, 284; Story's Eq. Pl., § 265.

lewdness, or misconduct in office, if the plaintiff intends to prove specific acts of notice, or of fraud, insanity, drunkenness, lewdness, or misconduct in office, it seems that such acts should be specifically charged in the bill. But this view is not fully supported by authority. It may also be stated generally, that whenever the plaintiff has evidence which is likely to take the defendant by surprise, it is the safer course to indicate its nature in the bill, rather than to run the risk of having it objected to at the hearing."[16] But as the cases upon the authority of which he made these statements were decided when each party's evidence was unknown to the other until the hearing,—a method of taking testimony long since disused,[17]—it is not likely that the courts would be as strict now as formerly in requiring such evidence to be pleaded.[18] Objections to a bill for lack of certainty should be raised by demurrer, or else they will usually be held to have been waived.[19]

§ 70. Inconsistency and bills with a double aspect.— A bill must not state two inconsistent states of fact and ask relief in the alternative. But it may state the facts and ask relief in the alternative according to the conclusion of law that the court may draw from them, so that if one kind of relief sought be denied, another may be granted; and it may state facts of a different nature not inconsistent with each other, and equally supporting the prayer for relief. In both of these cases a bill is said to have "a double aspect."[1] Thus, a bill may state facts constituting an attempt to form a new corporation by the consolidation of two already existing, and pray that, if the new corporation have a legal existence, the plaintiff may be declared entitled to a certain number of shares therein, otherwise to a corresponding interest in the stock of one of the old companies.[2] The complainant may seek to quiet the title to lands,

[16] Langdell's Eq. Pl., § 60. See Weston v. Empire Assurance Corporation, L. R. 6 Eq. 23; Clark v. Periam, 2 Atk. 337; Shepherd v. Morris, 4 Beav. 252.

[17] See Amendments to Rule 67, and *infra*, chapter XIX, on Evidence.

[18] See Smith v. Burnham, 2 Sumn. C. C. 612, 622; Story's Eq. Pl., § 265*a*.

[19] *Infra*, § 110.

§ 70. [1] Shields v. Barrow, 17 How. 130, 144; Halsey v. Goddard, 86 Fed. R. 25; Story's Eq. Pl., § 426, note, § 254.

[2] Kilgour v. New Orleans Gas-Light Co., 2 Woods, 144, 148. A bill to enjoin the infringement of a copyright may set forth an agreement between the author and the plaintiff, and then allege that if such agreement does not constitute an assignment of the copyright, it is an exclusive license. Black v. Henry G.

claiming either as devisee or as heir-at-law.[3] A bill may contain a prayer that an agreement be either set aside as obtained by fraud, or else specifically enforced,[4] or that the defendant either restore property obtained by fraud, or else pay the value of the same.[5] When the complainant alleged that a decree which he wishes to set aside was obtained either by mistake of all the parties, or by deception practiced upon himself, or by collusion of the defendant with third parties, the bill was held to be demurrable for indefiniteness.[6] "To allege that a sale is simulated, and if not simulated is fraudulent, meaning thereby it is a sham sale, and if not a sham then a real sale, but fraudulent, may be consistent, but it is not certain; and certainty is a requisite in equity pleading as well as consistency. It seems to me that, if there is doubt as to the nature of the transaction, the creditor, who has 'to strike in the dark,'

Allen Co., 42 Fed. R. 618, 623. See Chaffin v. Hull, 39 Fed. R. 877. The averment "that if said intention is true, which is denied, then the said State law, to wit, the Act of No. 85 of 1888, is null and void, because it operates as a discrimination against the shareholders of national banks, in violation of the express terms of section 5219 of the Revised Statutes of the United States," is sufficient to raise the issue whether there is in the act any discrimination prohibited by the act of Congress. Whitney Nat. Bank v. Parker, 41 Fed. R. 402, 406.

[3] Gaines v. Chew, 2 How. 619, 643.

[4] Hardin v. Boyd, 113 U. S. 756. But see Shields v. Barrow, 17 How. 130, 143; St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co., 33 Fed. R. 440, 448. A bill was sustained when filed by one partner against another praying for specific performance of a contract for the sale of land, or else for an account of the partnership debts, and a charge of their amount upon the land as belonging to the assets of the firm. Hoxie v. Carr, 1 Sumn. 173. It was held that a bill was not demurrable for multifariousness, or as based on antagonistic rights, which alleged that a mortgage debt was paid before the mortgage was foreclosed under a power of sale, and asked that the mortgage and deed be canceled, and, at the same time, asked that the sale be set aside because the mortgagee became the purchaser at his own sale. Dickerson v. Winslow, 97 Ala. 491; s. c., 11 S. R. 918. But see Cutler v. Iowa Water Co., 96 Fed. R. 777. If the plaintiff wish to set aside a deed on account of fraud, imposition, and undue influence, he may allege both that the maker was insane and that he had a great imbecility of mind. Story's Eq. Pl., § 254; Bennet v. Vade, 2 Atk. 325; Colton v. Ross, 2 Paige (N. Y.), 396; Lloyd v. Brewster, 4 Paige (N. Y.), 537; Mott v. Mott, 49 N. J. Eq. 177; s. c., 23 Atl. R. 997. But see Jackson v. Rowell, 87 Ala. 685; *supra*, § 69.

[5] Hubbard v. Urton, 67 Fed. R. 419. But see Alger v. Anderson, 92 Fed. R. 696.

[6] Brooks v. O'Hara, 8 Fed. R. 529; s. c., 2 McCrary, 644. But see Williams v. U. S., 138 U. S. 514, 517.

should charge a fraudulent simulation, and on discovery amend if necessary."[7] It was held in England that a bill may not pray relief primarily against one of two defendants, and, in case the court should hold him free from liability, then against the other.[8] A bill is bad when it contains two alternative claims each belonging to several persons, of whom one has no interest in one claim, and others have no interest in the other.[9] A bill should not pray in the alternative legal and equitable re-

[7] Pardee, J., in Socola v. Grant, 15 Fed. R. 487, 489.

A bill by a judgment creditor of a railroad company, against that and another railroad company, to redeem property in the possession of the latter company as mortgagee, on the ground that such possession was fraudulently acquired, and also to subject to the payment of the judgment certain bonds about to be issued by the latter, to the officers of the former company, in order to confirm the title to such property, was held to be bad as multifarious. Merriman v. Chicago & E. I. R. Co. (C. C. A.), 64 Fed. R. 535, 550, 551, per Baker, D. J.

The court said: "If the appellant's case was solely that the Eastern Illinois Company has no title to the property of the Danville Company, they might pray for various forms of alternative relief consistent with that case; but they cannot in the same bill make a case that it has no title, and also a case that it has a title, and then ask for inconsistent relief according to the different cases thus made. Such course of procedure we do not understand is warranted by the doctrine of alternative relief. Such are alternative cases, and not cases of alternative relief. They are inconsistent, for a decree of one of those forms of relief would proceed upon a theory fatal to the other form of relief."

Where a bank filed a bill to foreclose a mortgage and to restrain a sale of the mortgaged property to satisfy a judgment obtained against it by another, and the holder of the judgment thereupon filed an answer and cross-bill alleging that the mortgage had been withheld from record in fraud of creditors, and praying that the property be sold to satisfy the judgment, and the complainants filed an amendment alleging that, previous to the recovery of the said judgment, they themselves had recovered a judgment upon an indebtedness separate and distinct from the mortgage indebtedness, and that if their mortgage was invalid they had a prior lien under this judgment; it was held that the bill was demurrable for multifariousness. Mobile Savings Bank v. Burke (Ala.), 10 S. R. 328.

Where a bill prayed specific performance of a contract in relation to certain patents, and also contained expressions looking for relief by an injunction against an infringement of a patent, it was held that it could not be maintained for the latter relief as a bill with a double aspect, since the necessary parties must be different in each case. Am. Box Mach. Co. v. Crosman, 57 Fed. R. 1021. See Magic R. Co. v. Elm City Co., 13 Blatch. 151; Halsey v. Goddard, 86 Fed. R. 25.

[8] Clark v. Lord Rivers, L. R. 5 Eq. 91, 97. But see Kilgour v. New Orleans G. L. Co., 2 Woods, 144, 148.

[9] Stebbins v. St. Anne, 116 U. S. 386.

lief.[10] "When the pleadings are so framed as to rest the claim for relief solely on the ground of fraud, it is not open to the plaintiff, if he fails in establishing the fraud, to pick out from the allegations of the bill facts which might, if not put forward as proofs of fraud, have yet warranted the plaintiff in asking for relief. A defendant in answering a case not founded on fraud is not bound to do more than answer the case in the mode in which it is put forward. If, indeed, relief is asked alternatively, either on the ground of fraud, or, failing on that ground, on some other equity, a plaintiff failing on the first may succeed on the latter alternative. But then the attention of the defendant has been distinctly called to it, and he has been called upon to answer the case according to both alternatives. If is the duty of the judge to determine whether the two are so interwoven with each other that, on the failure of proof of fraud, it is impossible to treat the facts as separate allegations, justifying a separate mode of dealing with them."[11] This objection cannot be raised for the first time upon an appeal.[12] When a bill alleges both fraud and mistake, if the latter alone is proved the bill will be sustained.[13]

§ 71. Multifariousness in general.— A bill must not be multifarious. Multifariousness consists in the joinder of two or more distinct and unconnected grounds for equitable relief, each of which might be the foundation for a separate bill. This may occur in three ways,— by a misjoinder of plaintiffs, by a misjoinder of defendants, and by a misjoinder of grounds for equitable relief held by and against the same parties.[1] "To lay down any rule applicable universally, or to say what constitutes multifariousness as an abstract proposition, is, upon the authorities, utterly impossible. The cases upon the sub-

[10] Cherokee Nation v. Southern Kansas Ry. Co., 135 U. S. 641, 651; Alger v. Anderson, 92 Fed. R. 696.

[11] Dwight Foster's Lectures on Equity Pleading, MS.; Eyre v. Potter, 15 How. 42, 56; Britton v. Brewster, 2 Fed. R. 160; French v. Shoemaker, 14 Wall. 314, 335; Fisher v. Boody, 1 Curt. 206; Hoyt v. Hoyt, 27 N. J. Eq. 399; Wilde v. Gibson, 1 H. of L. Cases, 605; Hickson v. Lombard, L. R. 1 H. of L. 326; Thomson v. Eastwood, L. R. 2 App. Cases, 215; Price v. Berrington, 2 Macn. & G. 486, 498; Dashiell v. Grosvenor (C. C. A.), 66 Fed. R. 334; Grosvenor v. Dashiell, 62 Fed. R. 584; Brown v. Davis (C. C. A.), 62 Fed. R. 519.

[12] Wasatch Min. Co. v. Creston Min. Co., 148 U. S. 283.

[13] Williams v. U. S., 138 U. S. 514, 517.

§ 71. [1] Calvert on Parties, Book I, ch. vii.

ject are extremely various, and the court in deciding them seems to have considered what was convenient in particular circumstances, rather than to have attempted to lay down any absolute rule."[2] "The only way of reconciling the authorities upon the subject is by adverting to the fact that, although the books speak generally of demurrers for multifariousness, yet in truth such demurrers may be divided into two distinct kinds. Frequently the objection raised, though termed multifariousness, is in fact more properly misjoinder; that is to say, the cases or claims united in the bill are of so different a character that the court will not permit them to be litigated in one record. It may be that the plaintiffs and defendants are parties to the whole of the transactions which form the subject of the suit, and nevertheless these transactions may be so dissimilar that the court will not allow them to be joined together, but will require distinct records. But what is more familiarly understood by the term 'multifariousness,' as applied to a bill, is where a party is able to say he is brought as a defendant upon a record, with a large portion of which, and of the case made by which, he has no connection whatever."[3] There is, however, little practicable good to be obtained from a maintenance of this distinction except as a means of elucidating some of the expressions in the earlier authorities.[4] "The decisions on this subject are contradictory and unsatisfactory. The common-sense rule in such cases is that an individual shall not be called to maintain his title or shall not assert it in connection with others to which it has no analogy, and in the investigation of which the costs and complexity of the case will be increased."[5]

[2] Lord Cottenham in Campbell v. Mackay, 1 M. & Cr. 603, 618.

[3] Lord Cottenham in Campbell v. Mackay, 1 M. & Cr. 603, 618. Approved in Shields v. Thomas, 18 How. 253, 259.

[4] See Calvert on Parties, Book I, ch. vii.

[5] McLean, J., in Turner v. Am. Baptist Missionary Union, 5 McLean, 344, 349.

The following rule laid down by Mr. Gibson in his Suits in Chancery, section 292, was quoted with approval by Judge Jenkins in Von Auw v. Chicago T. & F. G. Co., 69 Fed. R. 448: "To make a bill demurrable for multifariousness it must contain all of the following characteristics. First, two or more causes of action must be joined against two or more defendants; second, these causes of action must have no connection or common origin, but must be separate and independent; third, the evidence pertinent to one or

§ 72. Multifariousness by misjoinder of plaintiffs.— No persons can unite as complainants in a bill in equity unless they have a joint or common interest in obtaining the same relief.[1] Thus, if one of them has no interest in the relief claimed, the bill is demurrable.[2] Those who claim the return of money paid by them severally on distinct promissory notes cannot join their claims in the same bill;[3] nor can several creditors claiming under several obligations unite in a suit to attach the debts of an absent debtor.[4] Persons who were defrauded of stock in a corporation by the same parties who promised it to them before the organization of the corporation cannot join in a bill to compel the issue of the stock to each of them.[5] Persons who have been separately indicted for similar acts committed while acting as agents for the same principal cannot join in a bill to enjoin the further prosecution of the indictments.[6] But in a bill to compel specific performance of a decree in a former suit, all the complainants in the first suit may join as plaintiffs, though the decree sought to be enforced orders the payment of specific sums severally to each of them;[7]

more of the causes must be wholly impertinent as to the other or others; fourth, one or more of the causes of action must be capable of being fully determined without bringing in other cause or causes to adjust any of the legal or equitable rights of the parties; fifth, the decree as to one or more of the separate or independent causes must be conclusive against one or more of the defendants, and the decree proper, as to the other cause or causes, must be conclusive against the other defendants or defendant; sixth, the relief proper against one or more of the defendants in one or more of the separate and independent causes of action must be distinct from the relief proper against the other defendant or defendants of the other cause of action; seventh, the satisfaction of the proper decree by any of the defendants to the extent of his alleged liability on any one or more of the distinct causes of action must not be a satisfaction of a proper decree against the other defendant or defendants, or the other cause or causes of action; and eighth, the multifariousness must be apparent, and the misjoinder of distinct causes of action manifest."

§ 72. [1] Story's Eq. Pl., § 279; Calvert on Parties (2d ed.), 105, 110.

[2] Walker v. Powers, 104 U. S. 245, 249; Doggett v. Railroad Co., 99 U. S. 72.

[3] Yeaton v. Lenox, 8 Pet. 123.

[4] Ibid. But see Norris v. Hassler, 22 Fed. R. 401; Langdon v. Branch, 37 Fed. R. 449.

[5] Summerlin v. Fronterizac S. M. & M. Co., 41 Fed. R. 249.

[6] Woolstein v. Welch, 42 Fed. R. 566.

[7] Shields v. Thomas, 18 How. 253. It has been held that this rule does not extend to a bill for specific performance of a contract to convey real estate in which the complainants hold distinct rights to separate lots. Marselis v. Morris & L. Co., 1 N. J. Eq. 31, 39.

and several fire insurance companies were allowed to unite in a bill to set aside one award against them upon an arbitration of claims by the same person under several policies.[8] Plaintiffs with conflicting interests cannot so join.[9] Such are, in a suit for the construction of a will, persons, each of whom is interested in having a different construction put upon it.[10] Nor can two join in a bill to set aside a fraudulent conveyance of land, of whom one claims the land as a creditor of the person who has made the conveyance, and the other as the purchaser of the land upon a sheriff's sale to satisfy a judgment held by him.[11] So, a bill was held to be multifarious which sought to enforce a trust in that land and also to give the title of one of the complainants to the same land.[12] But the interests of the complainants need not be co-extensive. Thus, a tenant for life and the remaindermen of an estate, either legal or equitable, may join in a suit to protect the estate.[13] Although usually there must be some privity between the complainants in a bill, yet in certain cases those between whom there is no privity are allowed to sue together when they seek to avert an injury which will affect them all alike. Thus, several tenants or parishioners may unite in a bill of peace seeking to dispose of a disputed right claimed against them by the lord of the manor[14] or the parson of the parish.[15] And the owners of several lots of land claiming under a common source of title may unite in a bill of peace against several other claimants to the same lots, who also rely upon a common source of

[8] Hartford Fire Ins. Co. v. Bonner, 44 Fed. R. 151.

[9] Walker v. Powers, 104 U. S. 245; Saumarez v. Saumarez, 4 Mylne & Cr. 331, 336; Parsons v. Lyman, 4 Blatchf. C. C. 432; Bell v. Cureton, 2 M. & K. 503; Stebbins v. St. Anne, 116 U. S. 386; Brown v. Bedford City L. & I. Co. (Va.), 20 S. E. R. 968. A bill was held multifarious where all the complainants sought as taxpayers to enjoin a defendant town from purchasing the plant of a defendant waterworks company, and one complainant further sought, as a stockholder in that company, to enjoin the sale on the ground of inadequacy of price. Peabody v. Westerly Waterworks (R. I., 1897), 37 Atl. R. 807.

[10] Parsons v. Lyman, 4 Blatchf. C. C. 432; Saumarez v. Saumarez, 4 M. & Cr. 331, 336.

[11] Walker v. Powers, 104 U. S. 245.

[12] Leslie v. Leslie, 84 Fed. R. 70.

[13] Story's Eq. Pl., § 279*a*; Buckeridge v. Glasse, 1 Cr. & Phill. 126; Calvert on Parties (2d ed.), 99; Rainey v. Herbert (C. C. A.), 55 Fed. R. 443.

[14] Anon., 1 Chan. Cas. 269; Smith v. Earl Brownlow, L. R. 9 Eq. 241.

[15] Rudge v. Hopkins, 2 Eq. Cas. Abr. 70.

title adverse to that of the complainant.[16] Several owners of different lots of land who have a common interest in an easement derived from the same source may unite in a suit to enjoin the obstruction of the easement.[17] Several claimants in possession of several parcels of land whose rights depend upon the same question of fact or law may unite in a bill of peace against the same defendant who claims title to all the land by reason of the same disputed facts or legal proposition.[18] The owners of adjacent property may join in a bill in equity to enjoin a defendant from erecting a livery-stable,[19] an unauthorized street railroad[20] or other nuisance in their vicinity. But another case holds that different persons, each of whom will suffer a distinct injury from the levy of a tax, cannot unite in a bill to enjoin its levy on account of its alleged unconstitutionality.[21] Several stockholders who had been compelled to pay corporate debts were allowed to join in a bill against another stockholder to compel him to contribute his proportion,[22] and several persons who had been induced by identical fraudulent misrepresentations to subscribe to stock in a corporation were allowed in Virginia to join in a suit to cancel their subscriptions.[23] It was held in New York, where the plaintiff prayed the same relief both individually and as executor upon the same cause of action, which appeared upon the face of his complaint to be for the benefit of the testator's estate, that there was no misjoinder of parties or of causes of action.[24] It has

[16] Crews v. Burcham, 1 Black, 352; Prentice v. Duluth S. & F. Co. (C. C. A.), 58 Fed. R. 437. It has been held that the pastor and some of the members of a religious association may unite in a suit to recover possession of the church and parsonage, to enjoin the trustees and the remainder of the congregation from interfering with each in his ecclesiastical rights; and also to compel an accounting for collections taken up, which are payable to the elder and pastor as salary. Fuchs v. Meisel, 113 Mich. 559; s. c., 60 N. W. R. 773. But see Douglass v. Boardman, 113 Mich. 618; s. c., 71 N. W. R. 1100.

[17] Springer v. Lawrence, 47 N. J. Eq. 461; s. c., 21 Atl. R. 41. See Union Mill & M. Co. v. Dangberg, 81 Fed. R. 73.

[18] Osborne v. Wisconsin Cent. R. Co., 43 Fed. R. 824. See Central Pac. R. Co. v. Dyer, 1 Saw. 641; *infra*, § 73.

[19] Flint v. Russell, 5 Dill. 151. See also Parker v. Nightingale, 6 Allen (Mass.), 341. *Contra*, Hudson v. Madison, 12 Simons, 416.

[20] Rafferty v. Central Tr. Co. (Pa. S. C.), 23 Atl. R. 884.

[21] Cutting v. Gilbert, 5 Blatchf. C. C. 259. See, however, Central Pac. R. Co. v. Dyer, 1 Saw. 641; Union Pac. R. Co. v. McShane, 3 Dill. 303.

[22] Allen v. Fairbanks, 45 Fed. R. 445,

[23] Rader v. Bristol Land Co. (Va.), 27 S. E. R. 590.

[24] Moss v. Cohen, 158 N. Y. 240.

been said that the fact that separate decrees may be requisite in order to afford complete relief does not necessarily make the bill multifarious.[26]

§ 73. Multifariousness by misjoinder of defendants.— No persons can be joined as defendants to a bill in equity who have not a joint or common interest in opposing the relief prayed.[1] Different relief may, however, be obtained against different defendants when the bill seeks to prevent or annul the effect of acts in pursuance of a common scheme, or so connected with each other as to form part of the same transaction.[2] The rule was thus stated by Sir John Leach: "In order to determine whether a suit is multifarious, or, in other words, contains distinct matters, the inquiry is not, as this defendant supposes, whether each defendant is connected with every branch of the cause, but whether the plaintiff's bill seeks relief in respect of matters which are in their nature separate and distinct. If the object of the suit be single, but it happens that different persons have separate interests in distinct questions which arise out of that single object, it necessarily follows that such different persons must be brought before the court, in order that the suit may conclude the whole object."[3] "The entirety of the case against one defendant constitutes the connecting link."[4] But a bill is multifarious, when the charge against one defendant is in no way connected with those against other defendants.[5] A bill is multifarious which seeks both to foreclose a mortgage and to restrain another defendant from asserting a

[26] Neal v. Rathell, 70 Md. 592; s. c., 17 Atl. R. 566.

§ 73. [1] Calvert on Parties, Book I, ch. vii; U. S. v. Alexander, 4 Cranch, C. C. 311.

[2] Calvert on Parties, Book I, ch. vii; Manners v. Rowley, 10 Simons, 470.

[3] Salvidge v. Hyde, 5 Maddock, 138, 146.

[4] Calvert on Parties (2d ed.), 98, quoting Sir John Leach in Turner v. Robinson, 1 Sim. & S. 313; and Lord Cottenham in Attorney-General v. Corporation of Poole, 4 M. & Cr. 17, 31; Halsey v. Goddard, 86 Fed. R. 25; Porter v. Robinson (Va.), 22 S. E. R. 843; Crickard v. Crouch's Adm'rs, 41 W. Va. 503; s. c., 23 S. E. R. 727; Middletown Sav. Bank v. Bacharach, 46 Conn. 513. But see Washington City Sav. Bank v. Thornton, 83 Va. 157; Buffalo v. Town of Pocahontas, 85 Va. 223; Sylvester v. Boyd, 166 Mass. 445; s. c., 44 N. E. R. 343; Staude v. Keck, 92 Va. 544; s. c., 24 S. E. R. 227.

[5] Wood v. Dummer, 3 Mason, 308; West v. Randall, 2 Mason, 181, 200; Lewarne v. Mexican Int. I. Co., 38 Fed. R. 620; Seales v. Pheiffer, 77 Ala. 278; Sumter County v. Mitchell, 85 Ala. 313; Van Houten v. Van Winkle, 46 N. J. Eq. 380.

claim of title adverse to both mortgagee and mortgagor,[6] at least when such adverse title occurred prior to the mortgage;[7] or to foreclose two mortgages by the same mortgagor upon separate lots owned by different persons;[8] or to foreclose a mortgage and recover damages from a third person for fraud in inducing the loan thereby secured.[9] But a party claiming a lien upon the property by a judgment against the mortgagor prior to the mortgage, the validity of which lien is contested by the mortgagee, may be joined as a party defendant to a foreclosure suit.[10] A bill is multifarious which seeks to obtain a transfer of land from one defendant, and to restrain another from asserting a conflicting claim to the same.[11]

[6] Dial v. Reynolds, 96 U. S. 340. But see California S. D. & L. Co. v. Cheney El. L. T. & P. Co., 56 Fed. R. 257; Mendenhall v. Hall, 134 U. S. 559, 568.

[7] Ibid.

[8] Eastern B. L. Ass'n v. Denton, 65 Fed. R. 569.

[9] Security S. & L. Ass'n v. Buchanan, 66 Fed. R. 799. So was held to be a bill to foreclose a mortgage on a gas plant, covering all moneys "furnished and hereafter paid" by a city for gas-light, which joined the city as a co-defendant with the mortgagor, and prayed for a judgment against the city for what it owed the mortgagor for light. International Tr. Co. v. Cartersville L. G. & W. Co., 63 Fed. R. 841, 846.

[10] Converse v. Michigan Dairy Co., 45 Fed. R. 18; Copen v. Fleshor, 1 Bond, 440.

[11] A bill by an executor to settle the conflicting controversies between himself, the heirs of his testatrix, the heirs of her husband, both of whom dispute bequests under her will, and one claiming to be a creditor of her estate. Haines v. Carpenter, 1 Woods, 262. An English case holds that different violators of the same copyright cannot be enjoined by the same bill when their acts of piracy were not performed in confederacy with each other. Dilly v. Doig, 2 Ves. Jr. 486. See Thomas H. El. Co. v. Sperry El. Co., 46 Fed. R. 75. But this case has been doubted by Judge Story (Story's Eq. Pl., §§ 277, 278), and distinguished by Chancellor Kent. Brinkerhoff v. Brown, 6 J. Ch. (N. Y.) 139, 155. The Federal courts might refuse to follow it. See Foxwell v. Webster, 10 Jur. (N. S.) 137.

The following bills have also been held to be multifarious: A bill by a creditor of an estate to enjoin the sale, to pay debts, of firm lands purchased by him from the heirs, and to recover from the administrator and his sureties the amount of his debt. Banks v. Speers, 103 Ala. 436. A petition against the executors of the petitioners' deceased father and against three successive guardians of the petitioners themselves, praying an account by the defendants of their respective trusts and waiving discovery. Cornwell Mfg. Co. v. Swift, 89 Mich. 503; s. c., 50 N. W. R. 1001. A bill to enforce a claim for *devastavit* against the personal representatives of some of the sureties upon an administrator's bond, and for a settlement of the estate, which also sought to enforce against the representatives of the other sureties, in their individual capacities, the personal penalty for failure to give the notice to creditors required by law.

Persons who are acting in concert as employees or directors of the same corporation in the infringement of a patent or trademark,[12] or who are charged with using a corporation as the means of such an infringement,[13] may be joined with the corporation as defendants to the same bill. A bill filed by an assignee in bankruptcy against all the incumbrancers of his assignor's estate, some but not all of whom had liens upon the same property, to set aside their liens as fraudulent, and to have the property sold for the common benefit of the creditors, was held not multifarious.[14] A bill filed by the beneficiary under several deeds of trust, some upon different parts of the same property, and one covering the entire property, against the trustees, the trustor, and the different persons claiming liens upon it, was held not multifarious.[15] A bill was sustained when filed by one of the next of kin against both an administrator and his sureties, to obtain the plaintiff's share of the estate.[16] A creditor's bill may be filed against the members of two different firms, and the personal representatives of those who are dead, when some are members of both.[17] A bill to enforce an

Page v. Bartlett, 101 Ala. 768. See also Cocks v. Varney, 42 N. J. Eq. 514; Henninger v. Heald, 51 N. J. Eq. 74; Bullock v. Knox, 96 Ala. 195; Dickerson v. Winslow, 97 Ala. 491; Smith v. Smith, 102 Ala. 516; Bolles v. Bolles, 44 N. J. Eq. 385, 14 Atl. R. 593; Wells v. S. & P. Guano Co., 89 Va. 708; Torrent v. Hamilton, 95 Mich. 159; Ashley v. City of Little Rock, 56 Ark. 391.

But bills were held *not multifarious* which were filed by next of kin against an administrator *de bonis non*, the administrator of his predecessor and the holder of the only claim against the estate, for the purpose of completing the administration and disallowing the claim (Deans v. Wilcoxon, 25 Fla. 980); by heirs against executors under a will, the probate of which had been revoked, and those who had bought property of the estate from them with notice of the invalidity of the will (Gaines v. Chew, 2 How. 619); and by a surety upon an official bond against the principal, the other sureties and purchasers with notice of property upon which the bond gave a lien. Schuessler v. Dudley, 80 Ala. 547.

[12] Popperhusen v. Falke, 4 Blatchf. C. C. 498.

[13] Nerve Food Co. v. Baumbach, 32 Fed. R. 205; California F. S. Co. v. Improved F. S. Co., 51 Fed. R. 296.

[14] McLean v. Lafayette Bank, 3 McLean, 415. See also Jones v. Slausson, 33 Fed. R. 632; Potts v. Hahn, 32 Fed. R. 660; Pullman v. Stebbins, 51 Fed. R. 10. *Contra*, Metcalf v. Cady, 8 Allen (Mass.), 587.

[15] Grant v. Phœnix Life Ins. Co., 121 U. S. 105. See Pullman v. Stebbins, 51 Fed. R. 10; Hibernia Ins. Co. v. St. Louis & N. C. Transp. Co., 10 Fed. R. 596; s. c., 120 U. S. 166.

[16] Payne v. Hook, 7 Wall. 425.

[17] Nelson v. Hill, 5 How. 127. See also Oliver v. Piatt, 3 How. 333. But see Griffin v. Merrill, 10 Md. 364. Bills have been sustained which were

equitable title, such as a trust,[18] or to remove a cloud upon a complainant's title,[19] may also seek partition after the primary relief has been established, provided that no defendants need be joined who are not proper parties to a suit for the principal relief. A bill was sustained which sought partition and also the cancellation of tax deeds upon the common property held by strangers to the partition.[20] A bill may be filed by the holder of a bond secured by a lien upon the property of a corporation against both the corporation and its stockholders, at the same time to foreclose his lien and to compel the stockholders to pay so much of the balance of their subscriptions to the stock of the corporation as will suffice for the payment of the deficiency after the foreclosure sale.[21] A bill of peace may

filed to dissolve a partnership and to partition the estate, real and personal (Briges v. Sperry, 95 U. S. 401), and to set aside an assignment of one partner's interest in the firm and then to divide the assets. Hayes v. Heyer, 4 Sandf. Ch. (N. Y.) 485.

[18] Hopkins v. Grimshaw, 165 U. S. 342, 358; Briges v. Sperry, 95 U. S. 461; Hayes' Appeal, 123 Pa. St. 110; Hayes v. Heyer, 4 Sandf. Ch. (N. Y.) 517. But see Belt v. Bowie, 65 Md. 350.

[19] Vreeland v. Vreeland, 48 N. J. L. 56; s. c., 24 Atl. R. 551. But see Robinson v. Springfield Co., 21 Fla. 203.

[20] Ulman v. Jaeger, 67 Fed. R. 980.

[21] Marine & R. P. M. & Mfg. Co. v. Bradley, 105 U. S. 175. So may a bill by the receiver of a national bank to recover dividends unlawfully paid to stockholders, although some of the defendants did not participate in all the dividends which he attacked. Hayden v. Thompson (C. C. A.), 71 Fed. R. 60; reversing s. c., 67 Fed. R. 273.

In New Jersey it was held that a stockholder's bill might be brought to recover damages for the negligence of the officers and directors of a bank for a period of time during part of which some of the defendants were not in office. Ackerman v. Halsey, 37 N. J. Eq. 356.

In Massachusetts a stockholder was allowed to file a bill against a corporation and an officer thereof to recover corporate funds misappropriated by the officer and to apply the same to a dividend due the complainant. Dunphy v. Traveller Newspaper Ass'n, 146 Mass. 495.

In Mississippi a stockholder's bill was sustained which sought to set aside two separate deeds of trust executed by the corporation where one of the defendants owned a number of the bonds secured by each deed. Hardie v. Bulger, 66 Miss. 577.

But bills were held to be *multifarious* which were filed by a stockholder which complained of other stockholders and officers for false representations which induced him to buy his stock, and against the corporation for a dissolution and an accounting because of the suspension of its business and waste of the corporate funds. Watson v. U. S. Sugar Ref. Co. (C. C. A.), 68 Fed. R. 769. It has been held that claims against directors and stockholders to enforce different liabilities cannot be combined. Cambridge Waterworks v. Somerville D. & B. Co., 14 Gray (Mass.), 198;

be filed to dispose of the claims of a number of defendants, which all depend on the determination of a single question of fact or law.[22]

A bill is not multifarious when brought to enjoin several members of a trade union or other persons from acts of vio-

Pope v. Leonard, 115 Mass. 286; Von Auw v. Chicago T. & T. G. Co., 70 Fed. R. 939.

In Massachusetts, by a stockholder against a corporation and its trustees praying for a return of money advanced by him to the corporation through the fraud of the individual defendants, which also alleged misappropriation of the corporate funds and prayed the appointment of a receiver, where there was no allegation that the corporation had no funds to repay the plaintiff, and the receivership was not sought merely as an incident to the principal relief. Davis v. Peabody, 170 Mass. 397; s. c., 49 N. E. R. 750.

A bill by a stockholder to enforce the liability to the corporation of one defendant for unpaid stock, his joint liability with five others to defraud the creditors of the corporation, and the liability of these five for the fraudulent sale of corporate property with which the first defendant was not connected. Holton v. Wallace, 66 Fed. R. 409.

In Missouri a bill by a creditor of an insolvent corporation to collect unpaid stock subscriptions and also to recover from one of the subscribers for his conduct as president in defrauding the corporation and also in injuring the individual property of complainant. Montserratt Coal Co. v. Johnson County C. M. Co., 141 Mo. 149; s. c., 42 S. W. R. 822.

[22] Gaines v. Chew, 2 How. 619; U. S. v. Castner, 26 Fed. R. 296, 298; Hyman v. Wheeler, 33 Fed. R. 329. Such are a bill by a parson or lord of a manor to establish a claim against all of his parishioners. Brown v. Vermuden, 1 Chan. Cas. 272. Or tenants, Conyers v. Lord Abergavenny, 1 Atk. 285; a bill by the owner of a fishery, Mayor of York v. Pilkington, 1 Atk. 284; a water-right, Union Mill S. M. Co. v. Dangberg, 81 Fed. R. 73; to establish his claim against a number of riparian owners, and to prevent injury to the stream, Woodruff v. North Bloomfield G. M. Co., 16 Fed. R. 25; Pacific L. S. Co. v. Handley, 98 Fed. R. 327. But a bill to enjoin the owners of a mill from floating logs over complainants' dam, and to recover damages for previous floatage, which joined as defendants former owners of the mill, was held to be multifarious. Allison v. Davidson (Tenn. Ch. App.), 39 S. W. R. 905. See Carmichael v. Texarkana, 94 Fed. R. 561.

It has been held that such bills may be filed by a railroad company against several ticket-scalpers to enjoin their sale of tickets which by their terms could not be transferred, and the use of which could only be accomplished by a fraud. Nashville, C. & St. L. Ry. Co. v. McConnell, 82 Fed. R. 65; by a city to establish its claim to a tax against several of the class liable to it, London v. Perkins, 3 Bro. Parl. Cas. 602; by a railroad company to restrain the tax collectors of different counties from levying taxes separately assessed, but part of each of which is to be paid to the State, and the validity of all of which depends upon the construction of a single statute, Union Pac. R. Co. v. McShane, 3 Dill. 303; to quiet a title

lence or other trespasses in furtherance of a strike.[23] Where the evidence did not justify a charge of combination made in the bill, it was dismissed for multifariousness upon the hearing.[24]

§ 74. Multifariousness without misjoinder of parties.— Multifariousness may also exist without a misjoinder of parties when two or more distinct and unconnected grounds of equitable relief are joined in the same bill. To create this defect the grounds of relief must be different, and each ground must be sufficient as stated to sustain a separate bill.[1] It has been said that a bill is multifarious which joins two matters where the necessary parties to the suit are the same, but their interests and attitude are decidedly at variance.[2] It has been held that a bill is multifarious when filed by the receiver against the directors of a national bank to recover claims for losses suffered by the corporation by reason of the directors' negligence, and also claims for losses suffered by the stockholders by reason of having been induced to subscribe for new shares by misrepresentations of the directors;[3] that so is

against a number of claimants to land in severalty, the validity of the separate title of each of whom depends upon the construction of one special statute, U. S. v. Flournoy L. S. & R. E. Co., 69 Fed. R. 886; Central Pacific R. Co. v. Dyer, 1 Saw. 641; see Osborne v. Wisconsin Cent. R. Co., 43 Fed. R. 824; *supra*, § 72; or the validity or construction of the same document, Gaines v. Chew, 2 How. 619; Crews v. Burcham, 1 Black, 352; Hyman v. Wheeler, 33 Fed. R. 329; U. S. v. Curtner, 26 Fed. R. 296, 298; or proceeding, Ulman v. Jaeger, 67 Fed. R. 980. But not a bill against thirty-four defendants to enforce thirty-four separate, although similar, contracts, Cheney v. Goodwin, 88 Me. 563; s. c., 34 Atl. R. 420; nor a bill against fifteen defendants to cancel separate notes severally held by them, some of which were alleged to be forgeries and the others obtained by fraud the forger and defrauder being a stranger to the suit, Scott v. McFarland, 70 Fed. R. 280.

[23] Oxley Stave Co. v. Coopers' Int. Union, 72 Fed. R. 695; Casey v. Cincinnati Typ. Union, 45 Fed. R. 135; Arthur v. Oakes (C. C. A.), 63 Fed. R. 310; *supra*, § 48; *infra*, ch. XVI.

[24] Coe v. Turner, 5 Conn. 86. But see *infra*, § 75.

§ 74. [1] Brown v. Guarantee S. D. & Tr. Co., 128 U. S. 403; Central Nat. Bank v. Fitzgerald, 94 Fed. R. 16. See Ziegler v. Lake St. El. R. Co., 76 Fed. R. 662.

[2] So said of a bill by one heir-at-law of a deceased married woman against her husband and the other heirs to set aside both her marriage settlement and her will. McDonnell v. Eaton, 18 Fed. R. 710.

[3] Price v. Coleman, 21 Fed. R. 357. See also Lewarne v. Mexican Int. Imp. Co., 38 Fed. R. 629. It has been held that a bill is multifarious when filed to collect an unpaid stock subscription, together with damages for

a bill which seeks an account of a trust held by all of the defendants, and also to set aside the effects of a distinct and independent fraud upon the trustor committed by only one of them;[4] a bill asking for a discovery by the defendant of an application for a policy of insurance, and for the specific performance of an agreement to issue the policy sought in the application;[5] and a bill praying the cancellation of a policy together with the perpetuation of testimony concerning the circumstances of its issue.[6] It is not multifarious to seek in

injury to the corporation by fraud, Holton v. Wallace, 66 Fed. R. 409; or with a claim for property conveyed to the defendant stockholder by the corporation in fraud of its creditors, First Nat. Bank v. Peavey, 75 Fed. R. 154; or with a claim for damages for false representations as to the company's financial condition. First Nat. Bank v. Peavey, 75 Fed. R. 154; and a bill against a corporation and its officers for a restoration to plaintiff of stock exchanged by him for trust certificates, on the false representation of the officers, and also to enjoin them from executing a mortgage on the corporate property, Schubart v. Chicago Gaslight & Coke Co., 41 Ill. App. 181.

But *not*, it has been said, a bill combining claims for liability against the same person for his acts and omissions as a director and as a stockholder. First Nat. Bank v. Peavy, 75 Fed. R. 154. But see Von Auw v. Chicago T. & F. G. Co., 70 Fed. R. 939; Cambridge Water-works v. Somerville D. & B. Co., 14 Gray (Mass.), 193; Pope v. Leonard, 115 Mass. 286; *supra*, § 73, note. Nor, it has been held, a bill by depositors against the directors and officers of a bank for negligence in the discharge of their official duties, and for fraudulent representations which induced plaintiff's deposits. Foster v. Bank of Abingdon, 88 Fed. R. 604; Solomon v. Bates (N. C.), 24 S. E. R. 478. Nor a bill to dissolve a partnership, which alleges that complainant was induced by fraud to enter into the agreement of partnership, that the defendant partner wilfully neglects to comply with the agreement, and that the business is being conducted at a loss. Rosenstein v. Burns, 41 Fed. R. 841. But see Behlow v. Fischer, 102 Cal. 208. Nor a bill filed by one railway company against another to compel an accounting as to the disposition and proceeds of bonds issued by the former to the latter, and the payment of the damages resulting from the foreclosure of the mortgage given to secure those bonds, and to recover the rents due under a lease of the plaintiff's road, when the execution of this lease and the issue of these bonds were parts of the same transaction. Pacific R. Co. of Missouri v. Atlantic & Pac. R. Co., 20 Fed. R. 277. It has been said that a bill is multifarious which prays an injunction against the building of a railroad, or in the alternative an award of damages or compensation for land proposed to be taken by the railroad company. Cherokee Nation v. Southern Kan. Ry. Co., 135 U. S. 641, 651. But see s. c., 135 U. S. 651, 652, cited *infra*, § 123; Townsend v. Vandernecker, 160 U. S. 171.

[4] West v. Randall, 2 Mason, 181. But see Mills v. Hurd, 32 Fed. R. 127.

[5] Markey v. Mutual Ben. L. Ins. Co., 6 Ins. L. J. 587.

[6] Ætna L. Ins. Co. v. Smith, 73 Fed. R. 318. But bills were held *not* to be

the same bill to reform a written agreement on account of a mistake, and to enforce its performance as reformed.[7] Nor is a bill multifarious when brought against a single defendant to collect assessments on account of the same improvement made against several different lots owned by him which do not join each other;[8] nor a bill which seeks an injunction against the infringement in a single publication of four separate copyrights and a right to the title of a fifth book.[9]

Multifariousness in bills to enjoin the infringement of patents is discussed in a subsequent section.[10] A bill is not multifarious when filed by the United States to set aside a land-patent for fraud, obtain an accounting of the rents and profits of the land, and recover damage for waste;[11] or to set aside two patents for inventions used jointly by the same defendant.[12] It has been held that a bill will not be dismissed as multifarious because the complaint, in addition to praying for the relief appropriate to the only cause of action supported by the facts pleaded in the bill, has also asked for other relief to which he is not entitled;[13] nor because the plaintiff seeks relief, which

multifarious when filed to set aside and cancel an insurance policy and enjoin the further prosecution of an action to recover premiums paid upon it, Eq. Life Ass. Soc. v. Patterson, 1 Fed. R. 126; and to compel the issue of such a policy, and at the same time to collect the same, Hebert v. Mutual L. Ins. Co., 12 Fed. R. 807; Brugger v. State Inv. Ins. Co., 5 Sawyer, 304.

[7] Gillespie v. Moon, 2 J. Ch. (N. Y.) 585.

[8] Fitch v. Creighton, 24 How. 159. But a bill was held to be worthless which alleged that complainant's title to certain property had been so thoroughly established by adjudication that further litigation would be vexatious, prayed that defendant might be enjoined from any further litigation affecting the same, and also claimed the enforcement of a statutory right to require the defendant's claim of title to be now set up, tried and determined. Lehigh Zinc Stove Co. v. N. J. Z. & I. Co., 43 Fed. R. 545. A bill to determine conflicting legal claims to land, and also asking for a partition of the land after the title should be determined, has been held multifarious. Chapin v. Sears, 18 Fed. R. 814. But see *supra*, § 73.

[9] Harper v. Holman, 84 Fed. R. 222. Nor a bill to enjoin the infringement of thirty separate copyrights which covered different parts of the same publication. Amberg F. & I. Co. v. Shea, 82 Fed. R. 314 (C. C. A.).

[10] *Infra*, § 77.

[11] U. S. v. Pratt C. & C. Co., 18 Fed. R. 708.

[12] U. S. v. Am. Bell Tel. Co., 128 U. S. 315.

[13] De Neufville v. N. Y. & N. Ry. Co., 81 Fed. R. 10; Brown v. Guarantee T. & S. D. Co., 128 U. S. 403, 412; Lehigh Zinc & I. Co. v. N. Y. Z. & I. Co., 43 Fed. R. 545. But see Carmichael v. Texarkana, 94 Fed. R. 561.

is not inconsistent, both for himself alone and for himself and others of the same class,[14] or for himself both individually and as trustee.[15]

§ 75. Objections for multifariousness.— An objection to a bill as multifarious should be raised by demurrer.[1] If not apparent upon the face of the bill, it is doubtful whether it can be raised by plea or answer.[2] If it is shown by the bill, it can never be taken for the first time at the hearing[3] or upon appeal;[4] but the court may, of its own motion, dismiss a bill for multifariousness at any time;[5] and perhaps the objection that the rights of the complainants are inconsistent can be raised at the hearing.[6] The objection cannot be taken by a defendant who is not injured by it.[7] The misjoinder of a defendant against whom the bill states no ground for relief is not a cause for a demurrer by the other defendants.[8] Multifariousness as to subjects or parties does not render a decree void, so that it can be treated as a nullity in a collateral action.[9] It has been held that a bill is not multifarious which joins an

[14] Foster v. Bank of Abingdon, 88 Fed. R. 604. *Contra*, as to a bill by a stockholder both to enforce an individual right and for relief for the common benefit of himself and the other stockholders. Church v. Citizens' St. R. Co., 78 Fed. R. 526.

[15] Metropolitan Tr. Co. v. Columbus S. & H. R. Co., 93 Fed. R. 689.

§ 75. [1] Nelson v. Hill, 5 How. 127.

[2] Benson v. Hadfield, 4 Hare, 32; Greenwood v. Churchill, 1 M. & K. 559; Gibbs v. Clagett, 2 Gill & J. (Md.) 14; Putnam v. Hollander, 6 Fed. R. 882. See §§ 77, 110; Story's Eq. Pl., § 747; Beames on Pleas, 157, 158. But see Coe v. Turner, 5 Conn. 86.

[3] Greenwood v. Churchill, 1 M. & K. 559; Oliver v. Piatt, 3 How. 333, 412; Nelson v. Hill, 5 How. 127; Bowman's Devisees v. Wathen, 2 McLean, 376. But see Coe v. Turner, 5 Conn. 37.

[4] Oliver v. Piatt, 3 How. 333, 412; Barney v. Latham, 103 U. S. 205, 215; Converse v. Michigan Dairy Co., 45 Fed. R. 18.

[5] Oliver v. Piatt, 3 How. 333, 412; Nelson v. Hill, 5 How. 127, 132; Greenwood v. Churchill, 1 M. & K. 559; Ohio v. Ellis, 10 Ohio, 456.

[6] Davies v. Quarterman, 4 Y. & Coll. 257.

[7] Buerk v. Imbaeuser, 3 Fed. R. 457. Where a contractor had agreed to pay an employee a percentage of the profits of contracts with different municipalities, it was held that a bill by the employee, joining the municipalities as co-defendants with the contractor, for an accounting, though said to be subject to dismissal for multifariousness at the instance of one of the municipalities, was not so at that of the contractor. Olds v. Regan (N. J. Ch.), 32 Atl. R. 827. See also Couse v. Columbia Power Mfg. Co. (N. J. Ch.), 33 Atl. R. 331.

[8] Warthen v. Brantley, 5 Ga. 571; Whitbeck v. Edgar, 2 Barb. Ch. (N. Y.) 106; Miller v. Jamison, 9 C. E. Green (N. J.), 41; Story's Eq. Pl., § 544.

[9] Hefner v. Northwestern Life Ins. Co., 123 U. S. 747.

insufficient with a good case for equitable relief, when there is no misjoinder of parties, and that the proper course of the defendant is to demur to so much of the bill as is insufficient;[10] but a bill is multifarious which joins two inconsistent complaints by different plaintiffs,[11] although the case shown by the principal plaintiff is insufficient. It is within the constitutional power of Congress to pass a law allowing, in a single specified suit against a corporation chartered by it, matters and defendants to be joined in a manner that would otherwise constitute multifariousness.[12] The question in each instance where it arises calls for the exercise of the discretion of the court, regard being had to considerations of convenience and the substantial rights of the parties.[13] Multifariousness depends so much upon the discretion of the courts of first instance, that a decision overruling an objection upon that ground would not be reviewed upon appeal,[14] except under very extraordinary circumstances. When an objection for multifariousness is sustained, the complainant will always be allowed, if he asks leave to do so, to amend upon payment of costs.[15] In general, it may be remarked that multifariousness is an objection much more often taken than sustained.

§ 76. Special provisions of the Federal equity rules and practice.— "The plaintiff may in the stating or narrative part of his bill state, and avoid, by counter-averments at his option, any matter or thing which he supposes will be insisted upon by the defendant by way of defense or excuse to the case made by the plaintiff for relief."[1] Such matter was formerly included in a separate part called the *charging part* of the bill, which, however, was never indispensable.[2] It is often important for the plaintiff to thus meet a defense which he antici-

[10] McCabe v. Bellows, 1 Allen (Mass.), 269; Snavely v. Harkrader, 29 Gratt. (Va.) 112; Story's Eq. Pl., § 283. See Brown v. Guarantee Trust Co., 128 U. S. 403.

[11] Walker v. Powers, 104 U. S. 245, 249.

[12] U. S. v. Union Pac. R. Co., 98 U. S. 569.

[13] Weir v. Bay State Gas Co., 91 Fed. R. 940, per Dallas, J.

[14] See Gaines v. Chew, 2 How. 619; Oliver v. Piatt, 8 How. 333; Barney v. Latham, 103 U. S. 205; Sheldon v. Keokuk N. L. Packet Co., 8 Fed. R. 769; Daniell's Ch. Pr. 335, note 2.

[15] Walker v. Powers, 104 U. S. 245, 249; Price v. Coleman, 21 Fed. R. 857.

§ 76. [1] Equity Rule 21.

[2] Story's Eq. Pl., § 33; Langdell's Eq. Pl., § 55.

pates. For as special replications are not allowed, he may thus save the delay of an enforced amendment of his bill, in order to plead new matter as a reply to a defense in the answer. "If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court, or that they cannot be joined without ousting the jurisdiction of the court as to other parties."[3]

"Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains;[4] or that his share had devolved on him since by operation of law; and that the suit is not a collusive one to confer on the court of the United States jurisdiction of a case of which it would not otherwise have cognizance.[5] It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action."[6] This rule does not apply to suits brought by the stockholders of a corporation after its dissolution.[7] But it applies after the

[3] Equity Rule 28; *supra*, § 52.

[4] Dannmeyer v. Coleman, 11 Fed. R. 97. See also Taylor v. Holmes, 14 Fed. R. 498; s. c., 127 U. S. 489.

[5] The allegation "that this suit is brought in good faith, and for the collection of, and to compel the collection of, what your orator believes to be a meritorious claim," is not equivalent to the allegation "that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance." Quincy v. Steel, 120 U. S. 241, 246, 247. For cases where refusals to sue were held not to be collusive, see Bowdoin College v. Merritt, 65 Fed. R. 213; Towl v. Am. Bl. & I Co., 60 Fed. R. 181. *Cf.* Ball v. Rutland R. Co., 93 Fed. R. 513.

[6] Rule 94. See also Hawes v. Oakland, 104 U. S. 450; Huntington v. Palmer, 104 U. S. 482; Dodge v. Woolsey, 18 How. 331; Greenwood v. Freight Co., 105 U. S. 13, 16; Detroit v. Dean, 106 U. S. 537, 542; County of Tazewell v. Farmers' L. & T. Co., 12 Fed. R. 752; Dimpfell v. Ohio & Miss. R. Co., 110 U. S. 209; Quincy v. Steel, 120 U. S. 241; §§ 12, 87, 207; Whitney v. Fairbanks, 54 Fed. R. 985.

[7] Lafayette Co. v. Neely, 21 Fed. R. 738. A stockholder may file a bill to enforce a cause of action belonging to an insolvent corporation when its

charter of the corporation has expired when the company still exists for the purpose of winding up its affairs.[8] The rule does not apply to a suit to restrain corporate actions to which the president of the corporation is made a party solely for purposes of discovery.[9] Nor to a bill by a depositor on behalf of himself and the other depositors to hold the directors of a bank responsible for losses caused by their misconduct.[10] Nor to a bill by a mortgagee of the assets of a corporation to prevent their destruction.[11] Nor to a case where it clearly appears that the corporation would certainly refuse the right upon which the suit is founded.[12] For example, a bill by a minority stockholder to set aside a contract fraudulently made between his corporation and another in which a majority of his fellow stockholders are interested, need not allege a previous demand upon his board of directors to bring the suit and their refusal, when it shows that such board has been elected by the hostile majority for their own interest.[13] It was held in New York that a previous demand upon a corporation to

assignee has refused to bring the suit. Streight v. Junk (C. C. A.), 59 Fed. R. 321.

[8] Taylor v. Holmes, 127 U. S. 489; s. c., 14 Fed. R. 498.

[9] Leo v. Union Pac. Ry. Co., 17 Fed. R. 278.

[10] Foster v. Bank of Abingdon, 88 Fed. R. 604.

[11] Consolidated Water Co. v. San Diego, 89 Fed. R. 272. But see Newby v. Oregon C. R. Co., 1 Sawyer, 63.

[12] County of Tazewell v. Farmers' L. & T. Co., 12 Fed. R. 752; Ranger v. Champion C. P. Co., 52 Fed. R. 611; Rogers v. Nashville, C. & St. L. Ry. Co. (C. C. A.), 91 Fed. R. 299; De Neufville v. N. Y. & N. Ry. Co. (C. C. A.), 81 Fed. R. 10. But see Squair v. Lookout Mountain Co., 42 Fed. R. 729; Farmers' L. & T. Co. v. Toledo, A. A. & N. M. Ry. Co., 67 Fed. R. 49; Church v. Citizens' S. R. Co., 78 Fed. R. 526.

[13] Rogers v. Nashville, C. & St. L. Ry. Co. (C. C. A.), 91 Fed. R. 299; De Neufville v. N. Y. & N. Ry. Co. (C. C. A.), 81 Fed. R. 10; Sager v. Culver, 147 N. Y. 241, 246; Earle v. Seattle, L. S. & E. Ry. Co., 56 Fed. R. 909; Eldred v. Am. P. C. Co., 99 Fed. R. 168; Berwind v. Canadian Pac. Ry. Co., 98 Fed. R. 158. Where a stockholder's bill to redeem property of the corporation sold under an execution upon a judgment, which was alleged to have been fraudulently obtained through the collusion of a majority of the directors, showed that the time allowed for redemption would expire within a few days, it was held that a previous demand upon the board was unnecessary. Young v. Alhambra Mine Co., 71 Fed. R. 810. Where a contract for the transfer of the corporate property was made by the stockholders individually, it was held that they might sue to rescind it for fraud, joining the corporation as a defendant, without showing a compliance with Rule 94. Old Colony Tr. Co. v. Dubuque, L. & T. R. Co., 89 Fed. R. 794.

disregard a lease did not authorize a suit to annul the same.[14] It has been held that the rule does not apply to a suit by a stockholder to enforce a right of action which the corporation could not enforce in its entirety, such as a suit which prayed the dissolution of the corporation as well as the rescission of a contract made by it.[15] Nor to a stockholder's bill filed in a State court and thence removed.[16]

In cases where the jurisdiction of the court depends upon the amount involved, the bill should show that the value of the matter in dispute exceeds the jurisdictional amount.[17]

If a bill be filed to impeach a patent or other grant by the United States and be not brought by the Attorney-General, or some other officer authorized by statute to do so, it should contain an allegation that the Attorney-General has "given such order for its institution as will make him officially responsible for it, and show his control over the cause."[18] The signature of the Attorney-General subscribed to the bill is sufficient to show his authority for filing it.[19] Where the Attorney-General is disqualified, the bill may be signed by the Solicitor-General and filed in his discretion.[20]

§ 77. Bills to enjoin the infringement of patents.— A bill to restrain the infringement of a patent must allege that the complainant or the person through whom he claims was the inventor or discoverer of the thing or process patented;[1] that it has not been previously patented, nor described in

[14] Flynn v. Brooklyn C. R. Co., 158 N. Y. 493, 509. The bill should show the time and manner of the demand and that the board of directors has not changed. Swope v. Villard, 61 Fed. R. 417. Where the bill showed that the corporation had refused to sue upon the advice of counsel that the proceeding could not be successfully maintained, it was dismissed. Hendrickson v. Bradley (C. C. A.), 85 Fed. R. 508.

[15] Barcus v. Gates (C. C. A.), 89 Fed. R. 783, 793. See Towle v. Am. R. L. & I. Co., 60 Fed. R. 131; Excelsior P. P. Co. v. Browne (C. C. A.), 74 Fed. R. 321. But see Becker v. Hoke (C. C. A.), 80 Fed. R. 973.

[16] Earle v. Seattle, L. S. & E. Ry. Co., 56 Fed. R. 909; s. c., Eabens v. Union Pac. Ry. Co., 58 Fed. R. 497.

[17] U. S. v. Pratt C. & C. Co., 18 Fed. R. 708; Murphy v. East Portland, 42 Fed. R. 308; Lehigh Z. & I. Co. v. N. J. Z. & I. Co., 43 Fed. R. 545, 546; Olson v. Nor. R. Co., 43 Fed. R. 112.

[18] Miller, J., in U. S. v. Throckmorton, 98 U. S. 61, 71.

[19] U. S. v. Mullan, 10 Fed. R. 785; s. c., 118 U. S. 271.

[20] U. S. v. Am. Bell Tel. Co., 128 U. S. 315.

§ 77. [1] Sullivan v. Redfield, 1 Paine, 441. For a precedent of a bill for the infringement of an original patent, see McCoy v. Nelson, 121 U. S. 484.

any printed publication;[2] that it was not in public use nor on sale for more than two years before the application;[3] that the plaintiff has a title to the patent or such an interest in the same as gives him the right to protection from the court;[4] and that the defendant has infringed the patent.[5] The bill must also

[2] Hutton v. Star S. S. Co., 60 Fed. R. 747; Diamond Match Co. v. Ohio W. Co., 80 Fed. R. 117; Goebel v. Am. Ry. Supply Co., 55 Fed. R. 825; Rubber T. W. Co. v. Davie, 100 Fed. R. 85; *infra*, § 545.

[3] Blessing v. John Traeger S. I. Works, 34 Fed. R. 753; Krick v. Jansen, 52 Fed. R. 823. An allegation that it had not been so used or sold with the consent of the inventor is insufficient. Ibid. The bill need not allege that the invention was not abandoned before the application for the patent. Warren F. Co. v. Warner Bros. Co., 92 Fed. R. 990.

[4] The bill must allege the ownership of the patent when it is filed. Krick v. Jansen, 52 Fed. R. 823. It has been held insufficient to aver simply the issue to complainant of the patent and that the letters-patent are in his possession. Lettelier v. Mann, 79 Fed. R. 81. When a bill alleged "that the patentee was the original, first, and sole inventor of a certain new and useful improvement in the construction of cable railways, fully described in the specification of the said letters-patent, which had not been patented to himself or to others, with his knowledge or consent, in any country, and had not, to his or the orator's knowledge, been in public use or on sale in the United States for more than two years prior to his invention and discovery thereof, and application for letters-patent of the United States therefor;" it was held sufficient. American Cable Ry. Co. v. City of N. Y., 42 Fed. R. 60. It has been held to be a sufficient allegation of title and infringement for the plaintiff to allege that he "was the true, original and first inventor of a certain new and useful improved application of steam power to the capstan of vessels, not known or used before;" "that a description or specification of the aforesaid improvement was given in his schedule to the aforesaid letters-patent annexed, accompanied by certain drawings referred to in said last mentioned schedule, and forming parts of said letters-patent,—the said letters-patent and the said specifiation thereto annexed (which, or an exemplified copy of which, your orators will produce, as your honors may direct) were duly recorded in the patent office;" and "that the defendant is now constructing, using, and selling steam-power capstans for vessels in some parts thereof substantially the same in construction and operation as in the said letters-patent mentioned." McMillin v. St. Louis & Mississippi Valley Transportation Co., 18 Fed. R. 260, 261. See McCoy v. Nelson, 121 U. S. 484. A bill for an injunction and an accounting was held to be good on demurrer, although it did not allege that the complainant was engaged in using the invention patented, or that it was a source of profit to him, when it alleged that the defendant had made profits by the use of the invention. Wirt v. Hicks, 46 Fed. R. 71.

[5] It has been held that a simple averment that the defendant has infringed the patents above described is sufficient. Am. Bell Tel. Co. v. Sou. Tel. Co., 34 Fed. R. 803. See also McMillin v. St. Louis & M. V. Tr. Co., 18 Fed. R. 260; McCoy v.

contain a substantial description of the patent or else set out the patent itself, or have the same annexed as an exhibit.[6] The history of the invention, and a description of patents issued to the complainant before that sued upon, are proper averments.[7]

Nelson, 121 U. S. 484; Cleveland F. & B. Co. v. U. S. Rolling S. Co., 41 Fed. R. 476. But see Am. S. L. B. Co. v. Empire S. N. Co., 50 Fed. R. 929. A bill which alleged the issue of a patent for a "process" of making furniture nails, which it set forth, alleged that the defendant, "in infringement of the aforesaid letters-patent," did wrongfully "make, use, and vend to others to be used, furniture nails embracing the improvement set forth and claimed in the aforesaid letters-patent," was held demurrable as not containing sufficient averment of infringement. Am. S. L. B. Co. v. Empire S. N. Co., 50 Fed. R. 929. It has been held that in a suit against two or more for the infringement of a patent, a general allegation of infringement is sufficient without a specific allegation that they are joint infringers. Indurated F. I. Co. v. Grace, 52 Fed. R. 124, 127; Diamond Match Co. v. Ohio Match Co., 80 Fed. R. 117. *Contra*, Shickle v. Foundry Co., 22 Fed. R. 105. A bill to enjoin the infringement of a patent by the use of a machine need not state what articles the defendant has made by the use of the machine. Fischer v. Hayes, 6 Fed. R. 76, 78. An allegation that the defendant "since the date of said patent" had infringed was held upon demurrer not to signify "ever since," but "after or subsequently to" that date. Brush El. Co. v. Ball El. Light Co., 43 Fed. R. 899. A bill which alleged that a complainant had obtained a certain patent, that the defendant had obtained patents of a later date which interfered with complainant's rights, and that defendant is making and selling machines under his patents, and has in other ways disturbed complainant in the use and enjoyment of the rights granted by his patent, was held to charge interference sufficiently. Stonemetz P. M. Co. v. Brown F. M. Co., 46 Fed. R. 72.

[6] Stirrat v. Excelsior Mfg. Co., 44 Fed. R. 142. When profert of the patent is made in the bill it has been held that only its title need be set forth. McMillin v. St. Louis & Miss. Valley Transportation Co., 18 Fed. R. 260. See Dickerson v. Greene, 53 Fed. R. 247. It has been said that the word "profert," as now used, does not imply that the recorded instrument, of which profert is made, is annexed to the bill or actually produced in court; and that it may be retained in the custody of the pleader. Germain v. Wilgus (C. C. A.), 67 Fed. R. 597. It has been held that the allegation "as by the said letters-patent and specification, all in due form of law ready in court to be produced, will fully appear," is equivalent to profert in the most formal and ample terms. It tenders the entire grant to the inspection of the court and party. Wilder v. McCormick, 2 Blatchf. 31; Dickerson v. Green, 53 Fed. R. 247; Bogart v. Hinds, 25 Fed. R. 484. See *infra*, § 106. But it is safer practice to allege also the number of the patent, and the volume and page of its record in the patent office. An allegation of the date without profert is not sufficient. Electrolibration Co. v. Jackson, 52 Fed. R. 773, 776. See Welsbach L. Co. v. Rex I. L. Co., 87 Fed. R. 477.

[7] Steam G. & L. Co. v. McRoberts, 26 Fed. R. 765.

It is also proper to describe previous litigation over the same or similar patent.[8] It was held at Circuit that in a bill founded upon a reissued patent it is not necessary to aver specifically the ground upon which the original patent was surrendered;[9] but if such a bill shows a delay of more than two years in the application for the reissue,[10] or in the patent office,[11] it must allege sufficient excuse for the delay. A bill to enjoin the infringement of several distinct patents has been held multifarious,[12] but if all the patents are infringed in the use of or manufacture of a single machine, process, manufacture, or composition of matter and it is so alleged, the bill is good.[13] It has been said that the complainant "should aver that said inventions are capable of conjoint as well as separate use, and are so used by

[8] Steam G. & L. Co. v. McRoberts, 26 Fed. R. 765; Am. Bell Tel. Co. v. So. Tel. Co., 34 Fed. R. 803. But see Western El. Co. v. Williams-Abbott El. Co., 33 Fed. R. 842.

[9] Spaeth v. Barney, 23 Fed. R. 828. Upon a demurrer for both uncertainty and want of equity to a bill founded upon a reissued patent, when the only allegations concerning the reissue were "that said Charles T. Day having, for good and lawful cause and with the consent and approbation of your orator, surrendered said letters-patent to the Commissioner of Patents, and having made due application therefor, and having in all things complied with the acts of Congress in such case made and provided, did, on the eighteenth of February, 1879, obtain new letters-patent, being reissued letters-patent, for the same invention for the residue of said term, and which were marked 'reissue, No. 8,590,' and were issued in due form of law to your orator, as assignee, under the seal of the patent office of the United States, signed by the Secretary of the Interior and countersigned by the Commissioner of Patents, and bearing date the day and year aforesaid, as by the last mentioned reissued letters-patent, ready here in court to be produced, will appear;" it was held that the bill was not objectionable. The court then said: "It is not necessary to aver, specifically, the ground on which the original patent was surrendered. The reissue of letters-patent by the Commissioner is *prima facie* evidence that such reissue is founded on sufficient cause, and is in accordance with law. It is also presumed that the Commissioner acted within his statutory authority until the contrary is proved." Ibid.

[10] Wollensak v. Reiher, 115 U. S. 96.

[11] Gandy v. Marble, 122 U. S. 432.

[12] Hayes v. Dayton, 8 Fed. R. 702; Shickle v. South St. Louis F. Co., 22 Fed. R. 105; Thomas H. El. Co. v. Sperry, 46 Fed. R. 75; Louden M. Co. v. Montgomery W. & Co., 96 Fed. R. 232.

[13] Nourse v. Allen, 4 Blatchf. C. C. 376; Perry v. Corning, 7 Blatchf. C. C. 195; Case v. Redfield, 4 McLean, 526; Gamewell F. A. Tel. Co. v. Chillicothe, 7 Fed. R. 351; Nellis v. McLanahan, 6 Fisher's Pat. Cas. 286; Diamond Match Co. v. Ohio M. Co., 80 Fed. R. 117. See U. S. v. Am. Bell Tel. Co., 128 U. S. 315.

the defendants."[14] An amendment adding such an averment will be allowed upon a demurrer.[15] A charge of infringement, and a prayer for an injunction and accounting accordingly, may be joined with a charge of interference and a prayer for relief, under section 4918 of the Revised Statutes.[16] A bill seeking an injunction with damages against the infringement of a patent, and an injunction with damages against the publication of libelous circulars affecting plaintiff's patent, has been held multifarious.[17] A bill seeking an injunction against the infringement of a patent and the infringement of a trade-mark was held not multifarious when the allegations as to both related to the same subject-matter.[18] And so was a bill to set aside a contract for a partnership in royalties, which also prayed an account of matters collected under a verbal understanding before the date of the contract.[19] Where a bill set out a contract relating to certain patents, and asked specific performance thereof against several parties, but also contained expressions looking to relief, as in a suit for infringement, it was held that it could not be sustained as a bill with a double aspect, because the determination of who are proper parties must be made from different standpoints in the two kinds of bills.[20] Persons who are acting in concert as employees of the same corporation in the infringement of a patent may be joined as defendants to the same bill.[21] An objection that defendants were improperly joined should be raised by demurrer when it appears on the face of the bill.[22]

[14] Gamewell F. A. Tel. Co. v. Chillicothe, 7 Fed. R. 351; Nellis v. McLanahan, 6 Fisher's Pat. Cas. 286.

[15] Union L. & S. Co. v. Philadelphia R. Co., 68 Fed. R. 914.

[16] Leach v. Chandler, 18 Fed. R. 202; Holiday v. Pickhardt, 29 Fed. R. 853; Swift v. Jenks, 29 Fed. R. 642; American Roll Paper Co. v. Knopp, 44 Fed. R. 609, 612; Stonemetz P. M. Co. v. Brown F. M. Co., 46 Fed. R. 72.

[17] Fougeres v. Murbarger, 44 Fed. R. 292. See International T. C. Co. v. Carmichael, 44 Fed. R. 349.

[18] Jaros H. U. Co. v. Fleece H. U. Co., 60 Fed. R. 622.

But the joinder of allegations concerning unfair trade in the patented article before the issue of the patent with infringement since the issue was held to constitute multifariousness. Ball & S. F. Co. v. Cohen, 90 Fed. R. 664.

[19] Patton v. Glantz, 56 Fed. R. 867. A bill for an infringement is not made multifarious by also pleading a contract in which it is alleged defendants have agreed not to contest the validity of the patent. Dunham v. Bent, 72 Fed. R. 60.

[20] American Box Mach. Co. v. Crosman (C. C. A.), 61 Fed. R. 888; s. c., 57 Fed. R. 1021.

[21] Poppenhusen v. Falke, 4 Blatchf. 498.

[22] Putnam v. Hollander, 6 Fed. R. 882. See §§ 75, 110.

§ 78. General rules of equity pleading.— Otherwise, the rules regulating the frame of a bill and, with the exceptions subsequently given, of other pleadings in equity are substantially the same as those of pleading at common law; but more liberality is used in their construction,[1] and the use of technical expressions is never necessary.[2] An allegation that the plaintiff is seized in fee simple is equivalent to an allegation that he is in possession.[3] If the plaintiff claim under a derivative title, he must show the steps by which it has come into existence.[4] Where, however, there is an existing privity between the plaintiff and defendant, independently of the plaintiff's title, which

§ 78. [1] Daniell's Ch. Pr. (2d Am. ed.), 413.

[2] Daniell's Ch. Pr. (2d Am. ed.), 414.

[3] Gage v. Kaufman, 133 U. S. 471. A plea which simply alleged that the defendant was "the sole owner in fee simple" of the property in question was held to be bad as a conclusion of law. McCloskey v. Barr, 38 Fed. R. 165. It was said: that, in a suit to remove a cloud from the title of land, generally, "it will be found sufficient for the plaintiff to allege his possession, and interest or estate in the land, as that he is the owner thereof in fee for life or for years, and that he claims the same by a regular chain of conveyances from some recognized and undisputed source of title, as, the United States, or its donee under the donation act of September 27, 1850, without setting out such conveyances or stating them in detail. But when there is reason to believe, as in this case and many others, that the rightfulness of the defendant's claim depends on the validity or legal effect of some link or links in the conveyances under which the plaintiff claims title, it is very convenient, if not necessary, that the statement of the plaintiff's case should contain the facts fully and in detail at that point in the chain of his title where it conflicts with the claim of the defendant. By so doing the necessity of future amendments will be avoided, and the progress and dispatch of the case promoted." A demurrer to a bill for a lack of certainty in this respect was sustained. Goldsmith v. Gilliland, 22 Fed. R. 865. But see Thomas v. Nantahala M. & T. Co., 58 Fed. R. 485. On the foreclosure of a mortgage for default in payment of interest coupons, an allegation that they are due and wholly unpaid "to your orator and other holders of said bonds" was held a sufficient allegation of ownership. Toler v. East Tennessee, V. & A. Ry. Co. (C. C. A.), 67 Fed. R. 168.

[4] Lord Digby v. Meech, Bunb. 195; Humphreys v. Tate, 4 Iredell's Eq. (N. C.) 220; Marshall v. Turnbull, 34 Fed. R. 827; Daniell's Ch. Pr. (2d Am. ed.) 369, 370. For a case upon the sufficiency of allegations in a bill that complainants comprise all the heirs and next of kin of deceased, as showing complainant's title, the bill also containing the decree of distribution, see Hubbard v. Urton, 67 Fed. R. 419. "It is not necessary, when all the legal and equitable owners are joined, to state the formalities or the mode of conveyance by which the equitable interests became vested in the co-complainants." Shipman, J., in Black v. Henry G. Allen Co., 42 Fed. R. 618, 623.

gives the plaintiff a right to maintain the suit; as, for example, if they are landlord and tenant, or mortgagor and mortgagee, then it is not necessary to state the plaintiff's title fully in the bill.[5] If the plaintiff's title would be incomplete without the performance of some preliminary act, such as the statutory requirements for a copyright, then a performance must be alleged, and a mere statement that the title is complete is insufficient.[6] In a bill filed by an executor or an administrator, it seems to be sufficient to state that the will has been proved, or letters of administration taken out, "in the proper court," without naming it.[7] If, however, the plaintiff undertake to name the court, and it be an improper or insufficient one, the bill is demurrable.[8] An allegation that the defendant is a trustee is insufficient without a statement of the facts which make him a trustee.[9] When the nature of the conveyance through which the plaintiff claims is such that by common law, independent of a statute, as the statute of frauds, for example, no deed, writing

[5] Daniell's Ch. Pr. (3d Am. ed.) 370, 371.

[6] Walburn v. Ingilby, 1 M. & K. 61; Daniell's Ch. Pr. (2d Am. ed.) 369; Story's Eq. Pl., §§ 257, 257*a*, 258. An allegation that the complainant acquired the title by purchase from the assignee in bankruptcy of the original owner was held sufficient, although it did not state that the assignee in bankruptcy obtained an order from the court authorizing him to make the sale. Amory v. Lawrence, 3 Cliff. 523. Where the plaintiff sued as a shareholder of a joint-stock company, and merely alleged in his bill "that he purchased for valuable considerations divers shares, upon which the instalment of five per cent. had been paid, and that he ever since has been, and now is, the holder of such shares;" while in another part of the bill it was alleged "that by the rules of the association, as set forth in the prospectus, no transfer of shares would be valid in law or equity, unless the purchaser was approved by a board of directors, and signed an instrument binding him to observe the regulations,"—it was held, on demurrer, that such action on the part of the board and the purchaser was a condition precedent to the transfer of the title to a share of stock; and that the bill was defective for not alleging such action. Walburn v. Ingilby, 1 M. & K. 61. A complainant who rests his title upon a tax deed must plead performance of the prerequisites to the validity of the deed. Greenwalt v. Duncan, 16 Fed. R. 35.

[7] Humphreys v. Ingledon, 1 P. Wms. 752; Black v. Henry G. Allen Co., 42 Fed. R. 618, 623. The averment that the complainant was duly "appointed" administrator was held insufficient; the issue of letters of administration must be alleged. Otto v. Regina M. B. Co., 87 Fed. R. 510.

[8] Tourton v. Flower, 3 P. Wms. 369; Black v. Henry G. Allen Co., 42 Fed. R. 618, 624; Daniell's Ch. Pr. (2d Am. ed.) 264.

[9] Evan v. Avon, 29 Beav. 144.

or other formality was essential to its validity, the English rule was that compliance with such formality need not be alleged.[10] In this respect equity followed the rule at common law, that such statutory regulations did not alter the form of pleadings.[11] If, however, it appeared upon the face of the bill that compliance had not been made with such a formality, the bill was demurrable upon that ground.[12] But when a right has been originally created by statute, as a right to land by devise, or in this country a patent or copyright, a compliance with the statutory requirements has to be alleged by one claiming under it.[13] It has been held that an estoppel *in pais* must be pleaded by the party who seeks to avail himself of the same.[14] "The rule in equity is that it is not sufficient to charge a fraud simply, but you must charge also some injury as the result of the fraud."[15] Where a bill shows apparent laches, it should set forth the impediments to an earlier suit, the cause of the complainant's previous ignorance, if any, of his rights, and when he first knew of them."[16]

In construing this, as well as all other parts of pleadings, every doubt is against the pleader;[17] but contracts by corporations are presumed to be within their charters until the contrary is shown.[18] When the bill contains general and specific allegations as to the same matter, the general allegations will be referred to those which are specific.[19] Exhibits attached to the bill, and therein referred to, are considered as a part of the same.[20] "As to exhibits, they are a mere matter of indulgence. In good pleading, strictly, the bill should give the requisite full information of itself; but indulgence to loose practice and

[10] Daniell's Ch. Pr. (2d Am. ed.) 416; Harrison v. Hogg, 2 Ves. Jr. 327.

[11] Daniell's Ch. Pr. (2d Am. ed.) 416; Stephen on Pleading, 313.

[12] Randall v. Howard, 2 Black, 585, 589; Daniell's Ch. Pr. (2d Am. ed.) 417; Redding v. Wilkes, 3 Brown, C. C. 401.

[13] Daniell's Ch. Pr. (2d Am. ed.) 419; Sullivan v. Redfield, 1 Paine, 441; Atwill v. Ferrett, 2 Blatch. C. C. 39.

[14] Maybury v. Louisville & J. F. Co., 60 Fed. R. 645.

[15] Linn v. Green, 17 Fed. R. 407.

[16] Badger v. Badger, 2 Wall. 87; Richards v. Mackall, 124 U. S. 183; Gandy v. Marble, 122 U. S. 432; Wollensak v. Reiher, 115 U. S. 96.

[17] Phelps v. McDonald, 99 U. S. 298, 305.

[18] Express Co. v. Railroad Co., 99 U. S. 191, 199.

[19] Ellis v. Colman, 25 Beav. 662; Lumley v. Wabash Ry. Co., 71 Fed. R. 21; Story's Eq. Pl., § 37*a*.

[20] Black v. Henry G. Allen Co., 42 Fed. R. 618, 625; *infra*, § 106.

convenience has allowed exhibits with explicit reference to them in the bill, and they may be referred to in aid of the bill; but they may not be omitted altogether, as here, and the pleader content himself with a naked reference by its date to some document of record in a far-away place."[21] "Good pleading requires that everything that is material to the case should be set forth in the pleading itself by proper averments. This may be done in general terms, and the exhibit may be referred to for greater certainty as to particular details, but the pleading ought to contain the substance of the case."[22] Where the plaintiff's title is intelligibly shown, there is no need of profert of the documents upon which it is founded.[23]

§ 79. The common confederacy clause.— The confederacy part, which came next in order, is now expressly declared unnecessary by the equity rules.[1] It is still, however, inserted by some practitioners. The old form was substantially as follows: "But now it is, may it please your honor, that the said A. B., combining and confederating with divers persons," or, if there are several defendants, "combining and confederating with the said C. D. and E. F., and with divers other persons, . . . at present unknown to your orator, whose names when discovered your orator prays he may be at liberty to insert herein, with apt words to charge them as the parties defendant hereto, and, contriving how to wrong and injure your orator in the premises, he the said A. B. at times pretends that."[2] "This practice is said to have arisen from the idea that without such a charge parties could not be added to the bill by amendment, and in some cases, perhaps, the charge has been inserted with a view to give the court jurisdiction."[3] It is mere surplusage,

[21] Hammond, J., in Electrolibration Co. v. Jackson, 52 Fed. R. 778, 776.

[22] Chancellor Ellett in Harvey v. Kelly, 41 Miss. 490.

[23] La Republique Francaise v. Schultz, 57 Fed. R. 379. "The demurrer says that the bill should make 'profert' of the letters patent, and the plaintiff replies that 'profert' is unknown to equity pleadings. Technically this may be so, but the equivalent of 'profert' is known; and whenever the law pleading must make 'profert,' the equity pleading must allege and prove with fullness enough to give all the benefit that 'profert' would give, and under a rule the production of the document would be compelled." Hammond, J., in Electrolibration Co. v. Jackson, 52 Fed. R. 778, 776. See *supra*, § 77, note 6; *infra*, § 206.

§ 79. [1] Equity Rule 21.

[2] Story's Eq. Pl., § 29, note 2.

[3] Mitford's Pl., ch. 1, § 2.

and being a conclusion of law, when inserted need not be answered.[4]

§ 80. The charging part.—Next followed formerly the charging part of the bill, which also has been declared unnecessary by the equity rules,[1] but is occasionally used. "'It usually consists of some allegation or allegations which set forth the matters of defense or excuse which it is supposed the defendant intends or pretends to set up to justify his non-compliance with the plaintiff's right or claim, and then charges other matters, which disprove or avoid the supposed defense or excuse. It is sometimes also used for the purpose of obtaining a discovery of the nature of the defendant's case, or to put in issue some matter which it is not for the interest of the plaintiff to admit; for which purpose the charge of the pretense of the defendant is held to be sufficient."[2] An example of such a case is the estoppel of the defendant to plead in defense.[3] If such averments are considered necessary now, the proper method of pleading is to include them in the narrative part of the bill.[4]

§ 81. The jurisdiction clause.—Then came the jurisdiction clause. This ran substantially as follows: "All which actings, doings, and pretenses of the said confederates are contrary to equity and good conscience, and tend to the manifest wrong, injury, and oppression of your orator in the premises. In tender consideration whereof, and forasmuch as your orator is entirely remediless by the strict rules of the common law, and can only have relief in a court of equity where matters of this nature are properly cognizable; to the end, therefore,"[1] etc. It is still the common usage to insert a short clause of this character, although it has been declared by the equity rules unnecessary.[2]

§ 82. The interrogatory clause.—The interrogatory clause which followed was of much more importance formerly, when parties to a suit could not testify in actions at common law, than it is at the present time. Yet, in addition to the inclu-

[4] Story's Eq. Pl., § 29; Lewin v. Welsbach Light Co., 81 Fed. R. 904.

§ 80. [1] Equity Rule 21.

[2] Story's Eq. Pl., § 31. See Mitford's Pl., ch. 1, § 3.

[3] Hill v. Hite (C. C. A.), 85 Fed. R. 268. But see Woodward v. Boston L. M. Co., 63 Fed. R. 609; Story's Eq. Pl., § 31; Southern Pac. R. Co. v. U. S., 168 U. S. 1.

[4] Equity Rule 21; Partridge v. Haycraft, 11 Ves. 574. See § 67.

§ 81. [1] Story's Eq. Pl., § 34, and notes.

[2] Rule 21. See Ely v. New Mexico & A. R. Co., 129 U. S. 291.

sion in the prayer for relief of a request that the defendants be compelled to answer the bill, it is still not unusual to require them to answer specific interrogatories. The equity rules provide as follows: "The interrogatories contained in the interrogating part of the bill must be divided as conveniently as may be from each other, and numbered consecutively 1, 2, 3, etc.; and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the bill, in the form to the effect following, that is to say: 'The defendant (A. B.) is required to answer the interrogatories numbered respectively 1, 2, 3, etc.'"[1] "The note at the foot of the bill, specifying the interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill; and the addition of any such note to the bill, or any alteration in or addition to such note after the bill is filed, shall be considered and treated as an amendment to the bill."[2] "Instead of the words of the bill now in use preceding the interrogatory part thereof,[3] and beginning with the words 'to the end, therefore,' there shall hereafter be used words in the form or to the effect following: 'To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several corporate oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to each of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer; that is to say,—

"'Whether, etc.

"'Whether, etc.'"[4]

§ 82. [1] Rule 41.

[2] Rule 42.

[3] The old form was as follows: "To the end, therefore, that the said A. B. and the rest of the confederates, when discovered, may, upon their several and respective corporate oaths, full, true, direct, and perfect answer make to all and singular the matters hereinbefore stated and charged, as fully and particularly as if the same were hereinafter repeated, and they thereunto distinctly interrogated; and that not only to the best of their respective knowledge and remembrance, but also as to the best of their several and respective information, hearsay and belief; and more especially that they may answer and set forth whether, etc.; or they may set forth and discover whether they do not know, have heard, or are informed, and in their conscience believe that," etc. Story's Eq. Pl., § 35, note 2.

[4] Equity Rule 43. For an excellent

No interrogatory need be answered or will be sustained which does not refer to some matter alleged in the narrative part of the bill,[5] but a number of interrogatories may be founded upon a single allegation.[6] The criterion of immateriality of interrogatories is not whether an affirmative answer will prove an allegation in a bill, but whether it will tend to prove the bill.[7] Interrogatories which sought a disclosure of the defendant's title,[8] and which asked for copies of correspondence by the defendants with strangers to the suit for the purpose of proving their system of loaning money,[9] were held to be impertinent. The defendant need not answer an interrogatory if by so doing he would subject himself to a penalty, or a forfeiture, or to punishment for a crime.[10] When there are no specific interrogatories the defendants are still bound to answer, either admitting or denying every part of the bill, as if they had been specifically interrogated thereabout.[11] An answer under oath to the whole of the bill, or to all but certain specified interrogatories, may be expressly waived by the plaintiff.[12] Such waiver is usually inserted in the prayer for relief or for process.

§ 83. The prayer for relief.—"The prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief. And if an injunction, or a writ of *ne exeat regno*, or any other special order pending the suit is required, it shall also be spe-

statement of the reasons for the use of specific interrogatories, see Report of Chancery Commissioners, 9th March, 1826, Appendix, pp. 1, 2; Story's Eq. Pl., § 38, note 3.

[5] Attorney-General v. Whorwood, 1 Ves. 534; Daniell's Ch. Pr. (2d Am. ed.), 422, 433; Fuller v. Knapp, 24 Fed. R. 100; Gormully & J. Mfg. Co. v. Bretz, 64 Fed. R. 612.

[6] Faulder v. Stuart, 11 Ves. 296; Bullock v. Richardson, 11 Ves. 375; Story's Eq. Pl., § 37.

[7] Uhlmann v. Arnholt & Schaeffer Brewing Co., 41 Fed. R. 369.

[8] Kelley v. Boettcher, 85 Fed. R. 55, 60.

[9] Alexander v. Mortgage Co., 47 Fed. R. 131. So in a patent case, the complainant was not allowed a discovery of the number of articles that the defendant had sold before a decree for an accounting. Keller v. Strauss, 88 Fed. R. 517. But see National H. B. B. Co. v. Interchangeable B. Co., 83 Fed. R. 26.

[10] Stewart v. Drasha, 4 McLean, 563; Atwill v. Ferrett, 2 Blatchf. C. C. 39; U. S. v. White, 17 Fed. R. 561, 565; *infra*, § 109.

[11] Amendment of 1850 to Rule 40; McClaskey v. Barr, 40 Fed. R. 559.

[12] Amendment of 1851 to Rule 41.

cially asked for."[1] Under the prayer for general relief the court will usually grant any relief[2] other than an interlocutory order, which is consistent with, and a ground for which is included in, the allegations of the bill,[3] and not inconsistent with the prayer for special relief or with the case made by the bill. It seems that if there be no objection to the specific relief prayed for, the plaintiff cannot at the hearing abandon that and obtain a decree for different relief.[5] It has been held in England, that, in some cases of fraud, where no other relief can be given against a party deeply involved in the fraud

§ 83. [1] Rule 21. Compare Bloomfield v. Eyre, 8 Beav. 250, 259.

[2] Tayloe v. Merchants' Fire Ins. Co., 9 How. 390; Stewart v. Chesapeake & Ohio Canal Co., 1 Fed. R. 361; County of Mobile v. Kimball, 102 U. S. 691; Chicago, St. L. & N. O. R. Co. v. Macomb, 2 Fed. R. 18; Adams v. Kehlor Milling Co., 36 Fed. R. 212.

[3] English v. Foxall, 2 Pet. 595; Curry v. Lloyd, 22 Fed. R. 258, 265; Mackall v. Casilear, 137 U. S. 556, 564.

[4] Hiern v. Mill, 13 Ves. 118; Soden v. Soden, there cited; Grimes v. French, 2 Atk. 141; Curry v. Lloyd, 22 Fed. R. 258, 265. In a suit upon a bill praying an injunction against the erection and operation of coke ovens on a certain street, and for general relief, the appellate court modified the decree by striking out so much thereof as granted an injunction against the operation of coke ovens so near the plaintiff's premises as to injure them by the exhalations therefrom, on the ground that this was not agreeable to the case made by the bill. Rainey v. Herbert (C. C. A.), 55 Fed. R. 443. Under a bill which prayed an injunction against the pollution of a spring and general relief, a Vermont court granted a decree confirming the complainant's title to the spring and enjoining interference with the same. Coffain v. Cole, 67 Vt. 226. Under a complaint for the rescission of a sale of land to a minor and for general relief, a Texas court decreed the foreclosure of a lien for the purchase-money. Morris v. Holland, 10 Tex. Civ. App. 474; s. c., 31 S. W. R. 690. And in Michigan a bill which alleged that the defendant had levied as sheriff was held to support an injunction against him in his official capacity although the prayer for relief did not describe him as sheriff. Wight v. Roethlisberger, 116 Mich. 41; s. c., 74 N. W. R. 474. Where the bill prayed merely a perpetual and not an interlocutory injunction against the construction of a street railway, and the facts proved upon the final hearing showed that an injunction then would not be justified, the Supreme Court held that the bill was properly dismissed, although it contained a prayer for general relief and averments supported by the evidence which showed that the complainant might be entitled to damages in the suit; since the averments were not introduced for that purpose and the complainant at the hearing disclaimed any desire for such relief. Osborne v. Missouri Pac. Ry. Co., 147 U. S. 248, 260.

[5] Allen v. Coffman, 1 Bibb (Ky.), 469; Pillow v. Pillow, 5 Yerg. (Tenn.) 420.

charged by the bill, the payment of the costs of the suit by that party ought to form the subject of a specific prayer, and that otherwise his demurrer to the bill will be sustained.[6] In a case where the bill contained allegations showing threatened injury to rights of property, not however mentioned as an independent ground of relief, while it was mainly occupied with complaints of a threatened invasion of rights of a political nature, as the specific prayers for relief were confined to the protection of the political rights, although the bill contained a general prayer for relief, the court refused to consider the allegations concerning the threatened injury to property.[7] A bill may pray relief in the alternative, when it is said to have a double aspect.[8] The prayer for general relief, Mr. Robbins, "an eminent counsel," used to say, was "the best prayer after the Lord's Prayer."[9] It is usually in one of the two following forms: "And that your orator shall have such other or further, or other and further, relief in the premises as to this court shall seem meet;" or "that your orator may be further and otherwise relieved in the premises according to equity and good conscience." If a different state of facts, under which the complainant is entitled to relief, appears upon the hearing, the court may allow the case to stand over, and give the plaintiff leave to amend his bill in conformity with them, and then obtain relief.[10] And if the complainant be an infant or the representative of a charity, it would formerly grant relief without regard to the allegations in the bill.[11]

§ 84. **Waivers and offers.**—It is customary to insert in the prayer for relief any waiver or offer which the plaintiff wishes to make;[1] although there is no reason why that should not be set forth in the narrative part of the bill. "If the complainant in his bill shall waive an answer in the oath, or shall only

[6] Le Texier v. The Margravine of Anspach, 15 Ves. 159, 164; Daniell's Ch. Pr. (2d Am. ed.) 441.

[7] Georgia v. Stanton, 6 Wall. 50.

[8] Shields v. Barrow, 17 How. 130, 144; Kilgour v. New Orleans Gas-Light Co., 2 Woods, 144, 148; Gaines v. Chew, 2 How. 619, 643. See *supra*, § 70.

[9] Mansaton v. Molesworth, 1 Eden, 26, note b; Dormer v. Fortescue, 3 Atk. 124; Story's Eq. Pl., § 41, n. 1.

[10] Beaumont v. Boultbee, 5 Ves. 485; Palk v. Lord Clinton, 12 Ves. 63; Daniell's Ch. Pr. (2d Am. ed.), 439, 440.

[11] Stapilton v. Stapilton, 1 Atk. 2; Attorney-General v. Jeanes, 1 Atk. 355; Story's Eq. Pl., § 40, note.

§ 84. [1] Daniell's Ch. Pr. (2d Am. ed.) 443.

require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause be set down for hearing on bill and answer only; but may nevertheless be used as an affidavit, with the same effect as heretofore, on a motion to grant or dissolve an injunction, or on any other incidental motion in the cause. But this shall not prevent a defendant from becoming a witness in his own behalf under section 3 of the Act of Congress of July 2, 1864."[2] It rarely happens that advantage of this rule is not taken by a waiver inserted here, or more frequently in the prayer of process, in order to avoid the rule, that otherwise an allegation responsive to the bill in a sworn answer is presumed to be true, unless rebutted by the testimony of two witnesses, or one witness and strong corroborating circumstances.[3]

In accordance with the maxim that he who seeks equity must do equity, a court of equity often refuses relief to one seeking its aid, unless upon condition that he shall do what it considers equitable to the defendant, or sometimes even to a third person.[4] In some cases it enforces this by the entry of a conditional decree without reference to the pleadings.[5] But the more usual practice is to insist that the plaintiff shall offer to perform, or, in some cases, allege the performance of, the equitable act that it requires of him in his bill, which otherwise will be demurrable. Thus, a bill to cancel securities claimed to be usurious, or otherwise rendered void by a statute, must, in the absence of a State statute to the contrary,[6] contain an offer by the plaintiff to pay the defendant the money he has received therefor with lawful interest.[7] So a bill to redeem a mortgage must contain an offer to pay what is due thereon, though the particular sum need not be specified.[8] A bill to set aside a judicial sale as void must be accom-

[2] Amendment of 1871 to Rule 41.

[3] Vigel v. Hopp, 104 U. S. 441.

[4] Fosdick v. Schall, 99 U. S. 235.

[5] Walden v. Bodley, 14 Pet. 156, 164, 165; *infra*, § 321.

[6] Mo., K. & T. Tr. Co. v. Krumseig, 172 U. S. 351.

[7] Mason v. Gardiner, 4 Brown, C. C. 436; Tupper v. Powell, 1 J. Ch. (N. Y.) 439; Matthews v. Warner, 6 Fed. R. 461, 465; s. c., 112 U. S. 600.

[8] Story's Eq. Pl., § 187*a*; Harding v. Pingey, 10 Jurist (N. S.), 872; Perry v. Carr, 41 N. H. 371; Robinson v. Iron Ry. Co., 135 U. S. 522; Gordon v. Smith (C. C. A.), 62 Fed. R. 503.

panied by a tender or offer of the purchase-money with interest, provided it was applied for the benefit of the estate, unless that money has been first repaid, which the court may require to be done before the bill is filed.[9] It seems that a bill to set aside a foreclosure of a railway mortgage should contain an offer of payment of the amount admitted to be due under the mortgage, and of the costs of the foreclosure suit, or at least show some reason why such an offer should not be required.[10] A bill to set aside a tax sale ordinarily must contain an offer to repay the purchaser, at least, all legal taxes on the property paid by him, both those for which the property was sold and those subsequently levied thereupon and paid by him, with interest upon each sum.[11] A bill to restrain the collection of State taxes must be preceded by payment of "what is conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted."[12] If the whole tax is claimed to be void as improperly assessed, it seems that the complainant must tender the amount he would owe if a proper assessment had been made.[13] It was held, however, that the rule did not apply to a special enactment which was fundamentally void and entirely illegal.[14] If the proper officer refuses to receive a part of the tax, it must be tendered without the condition annexed of a receipt in full.[15] Ordinarily, where it is impracticable for the plaintiff to ascertain the amount actually due, and the defendant denies his right to any relief, a tender in the bill without a previous payment is sufficient;[16] and in such a case an offer to pay the money into

[9] Davis v. Gaines, 104 U. S. 386. But see Rush v. First Nat. Bank (C. C. A.), 71 Fed. R. 102.

[10] Carey v. Houston & T. C. Ry. Co., 45 Fed. R. 438, 448.

[11] Gage v. Pumpelly, 115 U. S. 454. But see Mendenhall v. Hall, 134 U. S. 559, 569.

[12] State Railroad Tax Cases, 92 U. S. 575, 617; Albuquerque v. Perea, 147 U. S. 87. But see Chicago, B. & Q. R. Co. v. Republic County (C. C. A.), 67 Fed. R. 411; Chicago, B. & Q. R. Co. v. B. of C. of Norton County (C. C. A.), 67 Fed. R. 458; Chicago, M. & St. P. R. Co. v. Hartshorn, 80 Fed. R. 541.

[13] State Railroad Tax Cases, 92 U. S. 575, 617; National Bank v. Kimball, 103 U. S. 732.

[14] Norwood v. Baker, 172 U. S. 269, 293.

[15] State Railroad Tax Cases, 92 U. S. 575, 617; National Bank v. Kimball, 103 U. S. 732.

[16] Gordon v. Smith (C. C. A.), 62 Fed. R. 503; Butchers' & Drovers' S. Y. Co. v. Louisville & N. R. Co. (C. C. A.), 67 Fed. R. 35.

court whenever so ordered is equivalent to a payment into court in the first instance.[17] A bill to compel the specific performance of a contract by a defendant should, it seems, contain an offer by the plaintiff to perform his part thereof.[18] And formerly it was,[19] but no longer is,[20] required that a bill for an account should contain an offer on the part of the plaintiff to pay the balance, if any, found due against him. But a bill filed by the United States to vacate a patent for public lands as obtained by fraud, need not contain an offer to return the money paid therefor by the fraudulent patentee.[21] Nor need a bill to obtain relief against an infringement of a copyright contain a waiver of the complainant's statutory right to a forfeiture of the piratical plates.[22] It is, however, a rule in equity, that no person will be compelled to discover that which may expose him to a penalty or forfeiture.[23] A discovery of such matters can only be compelled when the complainant is the only person who can enforce the penalty or forfeiture, and he is willing to waive it,[24] as, for example, in a case of infringement of copyright.[25] An omission of a waiver, tender, or offer, whenever considered necessary, is a ground for demurrer;[26] but leave to amend is in such cases usually given.[27] And in many, but not all cases,[28] when no actual tender is required, a general offer to do whatever equity requires in the premises seems to be sufficient.[29]

[17] Cheney v. Bilby (C. C. A.), 74 Fed. R. 52.

[18] Daniell's Ch. Pr. (2d Am. ed.) 442; Stapylton v. Scott, 13 Ves. 425; Fife v. Clayton, 13 Ves. 546.

[19] Godbolt v. Watts, 2 Anst. 543; Daniell's Ch. Pr. (2d Am. ed.) 442.

[20] Colombian Government v. Rothschild, 1 Simons, 94, 103; Wells v. Strange, 5 Ga. 22.

[21] U. S. v. Minor, 114 U. S. 233; U. S. v. Trinidad Coal & Coke Co., 137 U. S. 160. See also Moffat v. U. S., 112 U. S. 24; U. S. v. White, 17 Fed. R. 561, 565; U. S. v. Pratt C. & C. Co., 18 Fed. R. 708.

[22] Farmer v. Calvert Lithog. Co., 1 Flippin, 228. But see Snow v. Mast, 63 Fed. R. 623.

[23] Stewart v. Drasha, 4 McLean, 563; Atwill v. Ferrett, 2 Blatchf. 39; U. S. v. White, 17 Fed. R. 561, 565; Snow v. Mast, 63 Fed. R. 623.

[24] Lord Uxbridge v. Staveland, 1 Ves. Sen. 56; Atwill v. Ferrett, 2 Blatchf. 39.

[25] Atwill v. Ferrett, 2 Blatchf. 39; Farmer v. Calvert Lithog. Co., 1 Flippin, 228, 233; *infra*, § 109.

[26] U. S. v. Pratt C. & C. Co., 18 Fed. R. 708.

[27] Chicago, B. & Z. R. Co. v. Republic County (C. C. A.), 67 Fed. R. 413; Chicago, B. & Q. R. Co. v. B. of C. of Norton County (C. C. A.), 67 Fed. R. 458.

[28] State Railroad Tax Cases, 92 U. S. 75, 617.

[29] Gordon v. Smith (C. C. A.), 67 Fed. R. 503.

§ 85. **The prayer of process.**— The prayer of process usually requests the issue of a subpœna to compel the defendant to appear and answer and abide the judgment of the courts "The prayer for process of subpœna in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact, so that the court may take order thereon as justice may require, upon the return of the process. If an injunction or a writ of *ne exeat regno*, or any other special order pending the suit, is asked for in the prayer for relief, that shall be sufficient, without repeating the same in the prayer for process."[1] "The plaintiff may complain and tell stories of whom he pleases, but they only are defendants against whom process is prayed."[2] It was, however, held that the omission in the prayer of process of the name of a defendant otherwise sufficiently described in the bill was waived by his general appearance, and that no other defendant could take advantage of the defect.[3] But the weight of authority holds that a bill is demurrable, which omits the prayer for process,[4] or which prays process against some but not all of the defendants named in its body.[5] If a party is sought to be sued in both his individual and a representative capacity, process should be asked against him in both capacities.[6] Otherwise, it seems, that he would be held to be a party only in that capacity in which he was therein referred to, even though in the subpœna and in the introduction to the bill he were named as a defendant in both capacities.[7] If process be prayed against a defendant in a representative capacity and the subpœna be issued against him generally, the bill is not demurrable.[8] The proper remedy is a motion to set aside the

§ 85. [1] Equity Rule 23; Segee v. Thomas, 3 Blatchf. C. C. 11; Buerk v. Imhaeuser, 8 Fed. R. 457.

[2] Lord Chancellor Parker in Fawkes v. Pratt, 1 P. Wms. 593.

[3] Buerk v. Imhaeuser, 8 Fed. R. 457; J. K. Orr Shoe Co. v. Kimbrough, 98 Ga. 537; s. c., 25 S. E. R. 204.

[4] Carlsbad v. Tibbetts, 51 Fed. R. 853, 855; Goebel v. Am. Ry. S. Co., 55 Fed. R. 825; Elmendorf v. Delancey, 1 Hopkins (N. Y.), 555. *Contra*, Jennes v. Landes, 84 Fed. R. 73.

[5] Ibid.

[6] Carter v. Ingraham, 43 Ala. 78. But see Brasher v. Van Cortlandt, 2 J. Ch. (N. Y.) 247.

[7] Ibid.

[8] Walton v. Herbert, 3 Green, Ch. (N. J.) 73.

subpœna.[9] The omission of the prayer for process does not render void an injunction granted upon the bill.[10]

§ 86. The signature to a bill.—"Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part that, upon the instructions given to him and the case laid before him, there is good ground for the suit in the manner in which it is framed."[1] This practice began, it is said, in the time of Sir Thomas More.[2] Before that time it was the practice for a master in chancery to examine the bill and determine whether it was better to dismiss it originally or retain it by subpœna.[3] A signature upon the back of the bill has been held to be sufficient.[4] The remedy for a defect in this respect is by a motion to take the bill off the file,[5] or by demurrer.[6] The court may of its own motion order the bill taken off the file.[7] Leave to amend by adding the signature is always granted.[8] If the defendant should answer without taking the objection, such a defect would probably be waived.[9] If the complainant sued in person, the signature of counsel would probably be dispensed with.[10] A bill is also usually signed by the solicitor, who may be the same person as the counsel, but need not be signed by the plaintiff unless he sue in person.

§ 87. Affidavits to bills.— An affidavit must be annexed to the bill in the following cases and no others, although a superfluous affidavit will not make the bill bad: A bill to obtain the benefit of an instrument upon which an action at law would lie, were it not either lost or out of the possession of the complainant and believed to be in that of the defendant, must be supported by an affidavit of those facts which are necessary to give the court jurisdiction.[1] A bill to perpetuate the testimony of

[9] Ibid.

[10] U. S. v. Agler, 62 Fed. R. 824.

§ 86. [1] Equity Rule 24.

[2] 1 Hargrave's Law Tracts, 302; Daniell's Ch. Pr. (2d Am. ed.) 357.

[3] 1 Hargrave's Law Tracts, 302; Daniell's Ch. Pr. (2d Am. ed.) 357.

[4] Dwight v. Humphreys, 3 McLean, 104.

[5] Dillon v. Francis, 1 Dickens, 68.

[6] Kirkley v. Burton, 5 Madd. 378; Dwight v. Humphreys, 3 McLean, 104.

[7] French v. Dear, 5 Ves. 547.

[8] Kirkley v. Burton, 5 Madd. 378; Dwight v. Humphreys, 3 McLean, 104.

[9] See U. S. R. S., § 954.

[10] See U. S. R. S., § 747; 1 Hoffman's Ch. Pr. 97.

§ 87. [1] Walmsley v. Child, 1 Ves. Sen. 343; Whitfield v. Fausset, 1 Ves. Sen. 392; Story's Eq. Pl., §§ 313, 477; Daniell's Ch. Pr. (2d Am. ed.) 449, 450.

witnesses, or to take testimony *de bene esse*, must be supported by an affidavit stating the reasons which render such a proceeding necessary.[2] A bill of interpleader, and perhaps also a bill in the nature of an interpleader, should be supported by an affidavit by the plaintiff that he does not collude with either of the defendants;[3] or if the plaintiff be a corporation, by one of its officers, that, to the best of his knowledge and belief, the plaintiff does not so collude.[4] "Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified under oath."[5] Every bill which it is desired to use in support of a motion for a stay order, special injunction, substituted service, or other interlocutory application, other than one for a common injunction, must be accompanied by an affidavit verifying the bill itself or the substance of its allegations;[6] but the affidavit need not be filed with the bill, nor before the notice of a motion for the interlocutory relief, and its omission does not make the bill demurrable.[7] In the first three instances, where an affidavit is required, the defendant can only take advantage of the defect by demurrer.[8] By plea or answer the omission will be waived.[9] It is doubtful whether, when an affidavit is required, one is sufficient which merely alleges that the bill is true to the best of the affiant's knowledge, information and belief.[10]

§ 88. Bills of interpleader.— A bill of interpleader is a petition filed by a disinterested person holding a fund or thing to which two or more who are made defendants set up conflicting claims, between whom he cannot decide without incurring the risk, if he delivers the property to one, of being finally obliged to pay the other damages for having done so.[1] It can only be filed by one who claims no interest in the prop-

[2] Philips v. Carew, 1 P. Wms. 117; Daniell's Ch. Pr. (2d Am. ed.) 452.

[3] Metcalf v. Hervey, 1 Ves. Sen. 248.

[4] Bignold v. Audland, 11 Simons, 23.

[5] Rule 94. See §§ 12, 76, 87, 207.

[6] See ch. XV.

[7] Hughes v. Northern Pac. Ry. Co., 18 Fed. R. 106, 110; Black v. Henry E. Allen Co., 42 Fed. R. 618, 622; Cobb v. Clough, 83 Fed. R. 604.

[8] Findlay v. Hinde, 1 Pet. 241, 244; Crosse v. Bedingfield, 12 Simons, 85; Daniell's Ch. Pr. (2d Am. ed.) 458.

[9] Findlay v. Hinde, 1 Pet. 241, 244; Crosse v. Bedingfield, 12 Simons, 85.

[10] Burgess v. Martin, 111 Ala. 636, 20 S. R. 506; Pollard v. So. Fertilizer Co. (Ala., 1899), 25 S. R. 169.

§ 88. [1] Mitford's Eq. Pl., ch. 1; Story's Eq. Pl., §§ 291–297; Daniell's Ch. Pr. (2d Am. ed.) ch. xxxii.

erty in question, and who seeks no other relief than leave to deposit it in the care of the court, and be relieved from all danger of further vexation concerning the same.[2] The conflicting claims must be doubtful.[3] The claimants must seek the same thing, not merely the same amounts under different contracts.[4] A tenant or agent may not, by filing such a bill, dispute the title of his lessor or principal when a demand is made upon him by a stranger claiming under title paramount;[5] nor can he thus compel an interpleader of two adverse claimants from whom he has taken independent leases of the same property.[6] He may, however, thus obtain relief when different persons claim under assignments from the person to whom he first owed the debt.[7] A licensee, in an action by his licensor for royalties, cannot interplead a third person who claims an interest in the patent.[8] A bill of interpleader may be filed before or after proceedings at law have been begun against the complainant;[9] but no injunction can be granted to restrain a proceeding already begun in a State court;[10] nor, according to the English rule, to stay proceedings in ejectment in any court.[11] If a suit in equity have been already begun against the stakeholder, he may perhaps obtain relief by a petition therein;[12] but the more prudent course is for him to file a new bill.[13] The fact that one of the conflicting claims is actionable at law and the other is purely equitable, will not deprive him of relief.[14] The enactment of a State statute giving similar relief upon motion by the defendant to an action at law, does not deprive equity of its original jurisdiction.[15] The most

[2] Killian v. Ebbinhaus, 110 U. S. 568; Langston v. Boylston, 2 Ves. Jr. 101; Mohawk & Hudson R. R. Co. v. Clute, 4 Paige (N. Y.), 384; Jackson & Sharp Co. v. Pearson, 60 Fed. R. 113, 123.

[3] Shaw v. Coster, 8 Paige (N. Y.), 339; Cochrane v. O'Brien, 2 Jones & La T. 380; Story's Eq. Pl., § 292.

[4] Hoggart v. Cutts, 1 Cr. & Ph. 197; Story's Eq. Pl., § 293.

[5] Dungey v. Angove, 2 Ves. Jr. 304, 310; Lowe v. Richardson, 3 Madd. 277; Story's Eq. Pl., § 295.

[6] Standley v. Roberts, 59 Fed. R. 836.

[7] Cowtan v. Williams, 9 Ves. 107; Clarke v. Byne, 13 Ves. 386; Hoggart v. Cutts, 1 Cr. & Ph. 197, 205.

[8] Pusey & Jones Co. v. Miller, 61 Fed. R. 401.

[9] Richards v. Salter, 6 J. Ch. (N. Y.) 445.

[10] U. S. R. S., § 720.

[11] Metcalf v. Hervey, 1 Ves. Sen. 248.

[12] Badeau v. Rogers, 2 Paige (N. Y.), 209.

[13] Birch v. Corbin, 1 Cox Eq. 144.

[14] Richards v. Salter, 6 J. Ch. (N. Y.) 445.

[15] Barry v. Mutual Life Ins. Co., 53

common kind of interpleader suits at the present time are those brought by insurance companies against conflicting claimants to the proceeds of policies issued by them.[16] A bill of interpleader should state the manner in which the plaintiff obtained possession of the property in question, and admit that he has no interest therein. It should set forth the claims of the defendants, showing that they conflict, and that he is ignorant of their respective rights, and cannot determine between them without hazard to himself. It should offer to deposit the fund or other property in the custody of the court; and conclude with a prayer that upon such deposit the defendants may be enjoined from further molesting him about the matter in question; that they be required to interplead and settle their respective rights among themselves; and that he may have his costs out of the fund, if there be one, otherwise from the defendants.[17] The bill must be accompanied by an affidavit; which, when filed by a natural person, should be sworn to by him, and state that "this bill is not filed in collusion with either of the defendants named, but merely of his own accord for relief in this Honorable Court."[18] If a corporation be the complainant, one of its officers should make the affidavit, swearing that, to the best of his knowledge and belief, the corporation does not collude with either of the defendants.[19] The omission of the affidavit is a ground for a demurrer.[20] The bill should also conform to the provisions of the rules regulating original bills. No other step can be taken in the cause until after deposit in court of the fund or other property in dispute.[21] It has, however, been held in England that a bill is not demurrable for the omission of an offer so to do.[22] It is better practice to obtain an order *ex parte* permitting such payment.[23] When that is done, an injunction will be granted re-

N. Y. 536; Wood v. Swift, 81 N. Y. 81, 85; Board of Education v. Scoville, 18 Kan. 17, 30; Prudential Assurance Co. v. Thomas, L. R. 3 Ch. App. 74, 77.

[16] Spring v. South Carolina Ins. Co., 8 Wheat. 268.

[17] Mitford's Eq. Pl., ch. 1; Story's Eq. Pl., §§ 291–297.

[18] Metcalf v. Hervey, 1 Ves. Sen. 248.

[19] Bignold v. Augland, 11 Simons, 23.

[20] Metcalf v. Hervey, 1 Ves. Sen. 248; Tobin v. Wilson, 3 J. J. Marsh. (Ky.) 67; Mitford's Eq. Pl., ch. 1.

[21] Meux v. Bell, 6 Simons, 175; Williams v. Walker, 2 Rich. Eq. (S. C.) 291.

[22] Meux v. Bell, 6 Simons, 175.

[23] Williams v. Walker, 2 Rich. Eq. (S. C.) 291.

straining the defendants from suing the plaintiff, and from continuing any action already begun touching the matter in dispute.[24] The injunction is usually granted to take effect upon payment of the fund into court.[25] Under special circumstances, however, a stay order might be granted until the complainant had an opportunity to do so.[26] Upon an argument to dissolve this injunction before hearing, it seems that the defendants cannot contradict the affidavit that there is no collusion;[27] but a reference may be directed when such a charge is made, and at the hearing collusion may be shown.[28] In England, a bill of interpleader can be successfully maintained though all the defendants are beyond the jurisdiction of the court.[29] Such suits are usually heard on bill and answers; although there is no reason why testimony should not be taken. If at the hearing the cause is ripe for a decision, the court will then decide the controversy between the defendants.[30] If not, it will enter a decree dismissing the plaintiff with his costs, enjoining the defendants in accordance with the prayer of the bill, and directing them to interplead.[31] If the claims on both sides are purely legal, an action or an issue at law will usually be directed. If one of them is of an equitable nature, and sometimes when both are legal, a reference to a master is usually ordered.[32] At the hearing, each defendant may read the other's answer against him.[33] If one of them has allowed the bill to be taken as confessed against him, this is considered as an admission that the bill was properly filed, and that he made an im-

[24] Sieveking v. Behrens, 2 Myl. & Cr. 581.

[25] Sieveking v. Behrens, 2 Myl. & Cr. 581.

[26] Sieveking v. Behrens, 2 Myl. & Cr. 581; U. S. R. S., § 718.

[27] Stevenson v. Anderson, 2 Ves. & B. 407; Manby v. Robinson, L. R. 4 Ch. App. 347; Fahie v. Lindsay, 8 Oreg. 474.

[28] Manby v. Robinson, L. R. 4 Ch. App. 347; Langston v. Boylston, 2 Ves. Jr. 101; Dungey v. Angove, 2 Ves. Jr. 304.

[29] Martinius v. Helmuth, G. Cooper, 248; Stevenson v. Anderson, 2 Ves. & B. 412. *Contra*, Herndon v. Ridgeway, 17 How. 424; and see § 96.

[30] Daniell's Ch. Pr. (2d Am. ed.) 1765; Angell v. Hadden, 16 Ves. 202; City Bank v. Bangs, 2 Paige (N. Y.), 570.

[31] Daniell's Ch. Pr. (2d Am. ed.) 1765; Angell v. Hadden, 16 Ves. 202; City Bank v. Bangs, 2 Paige (N. Y.), 570.

[32] Daniell's Ch. Pr. 1765; Story's Eq. Jur., § 822; Angell v. Hadden, 16 Ves. 202; City Bank v. Bangs, 2 Paige (N. Y.), 570.

[33] Bowyer v. Pritchard, 11 Price, 103; Daniell's Ch. Pr. 1765. See Penn Mut. L. I. Co. v. Union Tr. Co., 83 Fed. R. 891.

proper claim against the fund.[34] If, after answer, one of them defaults at the hearing, the court will enter a decree after hearing the other.[35] The plaintiff, if successful, is entitled to his costs out of the fund, if there be one.[36] Otherwise, from the defendant whose claim is finally held bad.[37] These costs, as well as the costs of the successful defendant, must eventually be paid by him whose claim is finally dismissed.[38] It has been said that when the bill is dismissed, there can be no further proceedings in the cause as between the defendants; not even by consent; inasmuch as the court has thereby lost jurisdiction.[39] After a decree in the plaintiff's favor, the cause is terminated as to him; and in case of his subsequent death the cause will proceed without a revivor.[40]

§ 89. Bills in the nature of interpleader.— Where the plaintiff claims for himself some interest in the fund or matter in question, or does not admit the whole of a defendant's claim, or the defendants claim different amounts, although a bill of interpleader may not, a bill in the nature of an interpleader may, perhaps, be sustained.[1] The frame of such a bill and the proceedings thereunder should conform, *mutatis mutandis*, to those of a strict bill of interpleader. After payment of what he admits to be due, a decree may be entered discharging the plaintiff as to that, and directing the suit, or, if an action at law had previously been begun, the latter, to proceed till his disputed rights are determined.[2]

§ 90. Bills of certiorari.— A bill of *certiorari* was a bill filed in a superior court of equity for the purpose of removing thither a suit in equity pending in an inferior court, on account

[34] Badeau v. Rogers, 2 Paige (N. Y.), 209; Fairbrother v. Prattent, 1 Daniel, 64. But see Standley v. Roberts, 59 Fed. R. 836.

[35] Hodges v. Smith, 1 Cox Eq. 357.

[36] Dunlop v. Hubbard, 19 Ves. 205; Dowson v. Hardcastle, 2 Cox Eq. 279.

[37] Aldridge v. Mesner, 6 Ves. 418; Mason v. Hamilton, 5 Simons, 19; Daniell's Ch. Pr. 1767.

[38] Mason v. Hamilton, 5 Simons, 19; Cowtan v. Williams, 9 Ves. 107; Daniell's Ch. Pr. (2 Am. ed.) 1766, 1767.

[39] Jennings v. Nugent, 1 Molloy, 134.

[40] Anon., 1 Vern. 351; Jennings v. Nugent, 1 Molloy, 134; Daniell's Ch. Pr. 1765.

§ 89. [1] Dorn v. Fox, 61 N. Y. 264; Mohawk & Hudson R. R. Co. v. Clute, 4 Paige (N. Y.), 385; Story's Eq. Pl. § 297*b*; Daniell's Ch. Pr. (2d Am. ed.), 1768. *Contra*, New England Mutual Life Ins. Co. v. Odell, 50 Hun (57 N. Y. S. C. R.), 279.

[2] City Bank v. Bangs, 2 Paige (N. Y.), 570. See Groves v. Senteel, 153 U. S. 465; s. c., 66 Fed. R. 179.

of some alleged incompetency in the latter or some defect in its proceedings.[1] Such a bill first stated the proceedings in the inferior court; then the cause of its incompetency, as, for example, that the subject of the action or the parties were not within its jurisdiction, or that, for some other cause, equal justice could not be done there; and finally prayed a writ of *certiorari*, to certify and remove the record and the cause to the superior court.[2] It did not pray that the defendant should answer, or even that he should appear to the bill, and, consequently, prayed for no writ of subpœna, although a subpœna had to be sued out and served.[3] It was considered as an original bill, and filed as such in the superior court. Thereupon, the plaintiff was required to execute a bond in the penalty of £100, with one surety conditioned to prove the suggestions of the bill in fourteen days. A subpœna was next sued out and served; and a writ of *certiorari* issued directed to the judge of the inferior court, requiring him to certify or send to the court issuing the writ the tenor of the bill or plaint below, with the process or proceedings thereon. The writ having been served and returned, together with the required statement and papers, an order directing them to be filed was then obtained. Testimony to prove or disprove the suggestions of the bill was immediately taken, and the cause referred to a master to report whether they were proven or no. This was required to be done within fourteen days, unless the court specially enlarged the time. If the allegations were proved and showed a sufficient reason for retaining the suit, an order to retain the bill was granted; and the defendant below was obliged to answer, and the cause removed proceeded in the same manner as if it had been originally instituted in the superior court.[4] In no reported case has such a bill been filed in a court of the United States, although petitions for writs of *certiorari* in proceedings at common law are not uncommon.[5]

§ 90. [1] Mitford's Pl., ch. 1; Story's Eq. Pl., § 298.

[2] Story's Eq. Pl., § 298.

[3] Story's Eq. Pl., § 298; Mitford's Pl., ch. 1.

[4] Hinde's Pr. 28–32 and 581, 582.

[5] See *infra*, § 365.

CHAPTER V.

SUBPŒNAS TO APPEAR AND ANSWER.

§ 91. Definition and form of subpœna.— The first process in a court of equity is the subpœna, which is a writ requiring the defendant to appear and answer the bill under a penalty therein expressed. A similar writ, called *quibusdam certis de causis*, in the form of a subpœna without any penalty, is also found in some of the early English chancery cases.[1] The process of subpœna constitutes the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill.[2] These writs, like all writs and processes issuing from the courts of the United States, must be under the seal of the court from which they issue, and signed by the clerk thereof. Those issuing from the Supreme Court or a Circuit Court must bear teste of the Chief Justice of the United States, or, when that office is vacant, of the associate justice next in precedence; and those issuing from a District Court must bear teste of the judge, or, when that office is vacant, of the clerk thereof.[3] When issued from the Supreme Court the writ must be in the name of the President of the United States.[4] It must be returnable into the clerk's office the next rule-day, or, at the election of the plaintiff, the rule-day but one, occurring twenty days from the time of the issue thereof,[5] except in the Supreme Court, when the return day must be at least sixty days after service of the writ.[6] "At the bottom of the subpœna shall be placed a memorandum that the defendant is to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable, otherwise the bill may be taken *pro confesso*."[7] The penalty named in the writ is now usually two hundred and fifty

§ 91. [1] O. W. Holmes, Jr., now C. J. of Mass., in an article on Early English Equity, 1 Law Quar. Rev. 162, note 2, citing Palgrave, King's Council, 131, 132, note x; Scaldewell v. Stormesworth, 1 Cal. Ch. 5.

[2] Equity Rule 7.

[3] U. S. R. S., § 911.

[4] U. S. S. C. Rule 5.

[5] Equity Rule 12.

[6] U. S. S. C. Rule 5.

[7] Equity Rule 12.

dollars; in earlier times it might be life or limb;[8] but it is never enforced, since the taking of the bill as confessed affords a far more substantial remedy. The subpœna should be addressed to the defendant against whom it is issued.[9] "When there are more than one defendant, a writ of subpœna may, at the option of the plaintiff, be sued out separately for each defendant, except in the case of husband and wife defendants, or a joint subpœna against all the defendants."[10] If a defendant is sued in a representative capacity, or in both an individual and a representative capacity, he should be so described in the subpœna; which should in this respect follow the prayer of process in the bill.[11] A subpœna addressed to John Monroe, guardian of John Stiles, is sufficient to give jurisdiction over him individually although it might not be to give jurisdiction over him as guardian.[12] Otherwise the service of the subpœna may be set aside upon motion, as issued without authority.[13] Such a defect will, however, be waived, if the defendant enter his general appearance in his representative capacity.[14]

The usual form of a subpœna in a Circuit Court of the United States is substantially as follows: —

THE PRESIDENT OF THE UNITED STATES OF AMERICA, TO JOHN ABER:

GREETING,— You are hereby commanded that you personally appear before the Judges of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit in Equity, on the first Monday of December, A.D. 1889, wherever the said Court shall then be, to answer a bill of complaint exhibited against you in the said court by ARCHIBALD BROWN, and do further and receive what the said Court shall have considered in that behalf. And this you are not to omit under the penalty on you of TWO HUNDRED AND FIFTY DOLLARS.

[8] Judge O. W. Holmes, Jr., in an article on Early English Equity, 1 Law Quar. Rev., 162, note 2, citing 1 Proceedings Privy Council (21 R. 2, 1397).

[9] Daniell's Ch. Pr. (2d Am. ed.) 495.

[10] Equity Rule 12.

[11] Carter v. Ingraham, 43 Ala. 78; Walton v. Herbert, 3 Green Ch. (N. J.) 73; Brasher v. Van Cortlandt, 2 J. Ch. (N. Y.) 247; see Cornell v. Green, 88 Fed. R. 821.

[12] Cornell v. Green, 88 Fed. R. 821; s. c. in C. C. A., 95 Fed. R. 334.

[13] Walton v. Herbert, 3 Green Ch. (N. J.) 73; Brasher v. Van Cortlandt, 2 J. Ch. (N. Y.) 242, 247.

[14] Ibid.; Buerk v. Imhaeuser, 8 Fed. R. 457.

WITNESS, Honorable MELVILLE W. FULLER, Justice of the United States at the City of New York, on the first day of November in the year one thousand eight hundred and eighty-nine, and of the independence of the United States, the one hundred and thirteenth.

ROBERT JONES, *Complainant's Sol'r.* JOHN A. SHIELDS, *Clerk.*

The Defendant is required to enter appearance in the above cause in the Clerk's office of this Court on or before the first Monday of December, 1889, or the bill will be taken *pro confesso* against him. JOHN A. SHIELDS, *Clerk.*

It must contain the christian as well as the surnames of the parties.[15]

§ 92. Issue of the subpœna.— No process of subpœna can issue from the clerk's office in any suit in equity until the bill is filed in the office.[1] Whenever a bill is filed the clerk must issue the process of subpœna thereon, as of course, upon the application of the plaintiff.[2] The signature of counsel is a sufficient warrant for his so doing. A præcipe, or written order for the subpœna, signed by the attorney is usually first given him. In the early times, the bill was first examined by one of the masters in chancery, whose duty it was to determine whether to dismiss the bill by original or to retain it by subpœna.[3] The present practice, it is said, originated when Sir Thomas More was Keeper.[4] In the Supreme Court of the United States a motion for leave to file a bill must first be made. This is usually heard *ex parte;*[5] but when leave was asked to file a bill against the President of the United States, under the peculiar circumstances of that case it was thought proper that argument should be heard against the motion for leave.[6] The court refused to extend this exception so as to include a suit by a State against General Grant when in command of the army, but then required ten printed copies of the bill to be filed with the clerk before the hearing, which it determined should be the regular practice in all cases of original jurisdiction brought before it.[7]

[15] Equity Rule 12, as amended Dec. 17, 1900, 180 U. S. 641.

§ 92. [1] Equity Rule 11. For the rule where a district is divided into two or more divisions, see U. S. v. Eddy, 28 Fed. R. 226.

[2] Equity Rule 12.

[3] Treatise on Masters of the Chancerie, 1 Harg. Law Tracts, 302; Daniell's Ch. Pr. (2d Am. ed.) 357.

[4] Ibid.

[5] Georgia v. Grant, 6 Wall. 241.

[6] Mississippi v. Johnson, 4 Wall. 475; Georgia v. Grant, 6 Wall. 241, 242.

[7] Georgia v. Grant, 6 Wall. 241.

Whenever any subpœna is returned not executed as to any defendant, the plaintiff is entitled to another subpœna, *toties quoties*, against such defendant, if he requires it, until due service is made."[8] It has been held that the clerk may issue to an attorney a summons duly sealed and signed without specifying the title of the cause, the names of the parties, or the return day; and that the attorney may fill in the blanks when he wishes to serve the paper.[9]

§ 93. **When a subpœna is necessary.**— No defendant can be brought before the court against his will without the service of a subpœna upon him.[1] A general appearance will, however, waive such an omission.[2] After a bill has been amended with no further change than the bringing in of new parties defendant, they alone need be served with a new subpœna.[3] If, however, it be otherwise substantially amended, according to the English practice a subpœna to answer the amendments had to be served upon all the defendants.[4] A subpœna to appear and answer a bill of revivor should be substantially in the form of a subpœna to an original bill, except that it requires the proper representatives of the party against whom it issues to appear at the next rule-day, which shall occur after fourteen days from the time of the service of the process, and there show cause, if any they have, why the cause should not be revived.[5]

§ 94. **Personal service of a subpœna.**— Except in certain exceptional cases the service of the subpœna must be personal[1] and made within the district.[2] It must be made by the mar-

[8] Equity Rule 14.

[9] Jewett v. Garrett, 47 Fed. R. 625.

§ 93. [1] Equity Rule 7.

[2] Buerk v. Imhaeuser, 8 Fed. R. 457.

[3] Longworth v. Taylor, 1 McLean, 514; Angerstein v. Clarke, 1 Ves. Jr. 250; Skeffington v. ———, 4 Ves. 66.

[4] Cooke v. Davies, T. & R. 309; Bramston v. Carter, 2 Simons, 458. See Kendall v. Beckett, 1 Russ. 152.

[5] Equity Rule 56.

§ 94. [1] Equity Rule 13.

[2] Toland v. Sprague, 12 Pet. 300, 328; Picquet v. Swan, 5 Mason, 35; Bourke v. Amison, 32 Fed. R. 710; Butterworth v. Hill, 114 U. S. 128; *supra*, § 22. The indorsement by the defendant upon a subpœna issued from the Circuit Court for Vermont: "Washington, D. C., October 18th, 1883. I hereby accept service of the within subpœna, to have the same effect as if duly served upon me by a proper officer, and I do hereby acknowledge the receipt of a copy thereof. E. M. Marble, Com'r of Patents," has been held to be merely that "the commissioner admits service with the same effect it would have if made by an officer of the District of Columbia," and not to be a waiver of the objection that the subpœna could not properly be served beyond the jurisdiction of the

shal of the district or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise.[3] "When the marshal or his deputy is a party in any cause, the writs and præcepts therein shall be directed to such disinterested person as the court or any justice or judge thereof may appoint, and the person so appointed may execute and return them."[4] If the marshal or his deputy make the service, his unverified return is sufficient,[5] and it has been said cannot be contradicted,[6] the only remedy being an action against the officer for a false return.[7] But it is capable of subsequent amendment.[8] Where there has been personal service upon the defendant by a special deputy, the fact that the return was in the name of such deputy instead of in the name of the marshal was held an irregularity which did not avoid the judgment when attacked in a collateral proceeding.[9] It has been held that the return to a State court by a sheriff cannot be amended after a removal.[10] The return should state where the service was made, if the defendant reside without the district,[11] and

court whence it issued. Butterworth v. Hill, 114 U. S. 128, 132, 133. A case at Circuit holds that an acceptance of due service of process amounts to no more than personal service at the place where the acceptance is made, and is not a waiver of the objection that the defendant is not an inhabitant of the district. U. S. v. Loughrey, 43 Fed. R. 449.

[3] Equity Rule 15; Deacon v. Sewing M. Co., 14 Rep. 43. A copy of an order, that non-resident defendants appear and plead before a day specified therein, served under an order for substituted service, may be served by any one, although the usual practice is to serve it by a deputy marshal of the district where the defendants are found. Forsyth v. Pierson, 9 Fed. R. 801. It was held that the marshal might give an attorney an appointment of a special deputy with the name in blank with oral permission to the attorney to fill in the same. Jewett v. Garrett, 47 Fed. R. 525.

[4] U. S. R. S., § 922.

[5] Von Roy v. Blackman, 3 Woods, 98, 101; Phœnix Ins. Co. v. Wulf, 1 Fed. R. 775; Equity Rule 16. Where the defendant was named in the bill as Jacob Kraig, a return that the subpœna had been served on Jacob King was held insufficient. McClaskey v. Barr, 45 Fed. R. 151.

[6] Von Roy v. Blackman, 3 Woods, 98, 100. It has been held by the Circuit Court for the District of Indiana, following an Indiana statute, that the return cannot be contradicted. Joseph v. New Albany F. & R. Mill Co., 53 Fed. R. 180. But see McClaskey v. Barr, 45 Fed. R. 151.

[7] Von Roy v. Blackman, 3 Woods, 98, 100.

[8] Phœnix Ins. Co. v. Wulf, 1 Fed. R. 775.

[9] Hill v. Gordon, 45 Fed. R. 276.

[10] Tallman v. B. & O. R. Co., 45 Fed. R. 156: *infra*, § 391.

[11] Allen v. Blunt, 1 Blatchf. 480, 487; Thayer v. Wales, 5 Fisher's Pat. Cas. 448.

probably in any event. If another than the marshal or his deputy serve the subpœna, proof must be made by the affidavit of the process-server.[12] "The service of all subpœnas shall be by a delivery of a copy thereof by the officer serving the same to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant with some adult person who is a member or resident of the family."[13] When a husband and wife are parties a copy must be served upon each, although the former practice was complied with by service upon the husband alone.[14] When a defendant was sued both individually and in a representative capacity, it was held that only one copy of the subpœna need be left with him.[15] Service at the door of the defendant's dwelling has been held a sufficient compliance with the rule.[16] In an English case, where infant defendants were secreted, service upon their mother was allowed, and held sufficient.[17] Where a guardian *ad litem* has been appointed it will be presumed, in the absence of evidence to the contrary, that his wards were duly served.[18] Chief Baron Gilbert, in his "Forum Romanum," says of the subpœna: "The service is good in the night or on Sunday, if it be before the time of the return; for this being only process of notice, and not to arrest the parties, it can create no disturbance, though it be served in the night or on Sunday."[19] It has, however, since been held in England that a service on Sunday may be set aside.[20] A decision at Circuit holds that, in an extraordinary case, a warrant of arrest in admiralty can be issued on Sunday.[21] Personal service of the subpœna cannot,

[12] Equity Rule 15.

[13] Equity Rule 13. See Phœnix Ins. Co. v. Wulf, 1 Fed. R. 775; Hyslop v. Hoppock, 5 Ben. 447.

[14] O'Hara v. MacConnell, 93 U. S. 150; Robinson v. Cathcart, 2 Cranch C. C. 590.

[15] Cornell v. Green, 88 Fed. R. 821; s. c. in C. C. A., 95 Fed. R. 834.

[16] Phœnix Ins. Co. v. Wulf, 1 Fed. R. 775. For cases where the proof of service was held insufficient, see Blythe v. Hinckley, 84 Fed. R. 228; Swift v. Meyers, 87 Fed. R. 37.

[17] Smith v. Marshall, 2 Atk. 70. Mr. William Allen Butler, in a learned opinion when referee, held that, where a guardian *ad litem* was appointed, service of a subpœna upon his infant ward was not indispensable to the jurisdiction. Sloane v. Martin, 77 Hun, 249. See *supra*, § 39.

[18] Sloane v. Martin, 77 Hun (N. Y.), 249. See *supra*, § 39.

[19] Gilbert's Forum Romanum (Tyler's ed.), 42.

[20] Mackreth v. Nicholson, 19 Ves. 367.

[21] Pearson v. The Alsalfa, 44 Fed. R. 358 (U. S. D. C. D., S. C.).

in the absence of any special statutory provision, be made beyond the territorial jurisdiction of the court;[22] except that in a case of a local nature, at law or in equity, where the land or other subject-matter of a fixed nature, such as a railroad, is in both districts of the same State or is situated entirely in either district of a State which is divided into two or more districts, a defendant resident therein may perhaps be served by the marshal of any district in that State where he resides.[23] It has been held that a suit brought solely for the purpose of appointing a receiver of a railroad, with an injunction against its creditors,[24] a suit to determine the rightful owners of a fund in court,[25] and a suit by the United States to determine the right of an Indian tribe to a fishery,[26] are such cases of a local nature. In other cases where a State is divided into two or more districts the defendant cannot be served out of the district.[27]

When a petition is filed by a district attorney of the United States praying an injunction against a combination in restraint of commerce among the several States or with foreign nations, the subpœna may be served by leave of the court in any district by the marshal thereof.[28] In suits for the infringement of patents, service may be made in the district where the suit is brought upon any agent of the defendant engaged in conducting the defendant's business there, provided that the defendant has a regular place of business in the district and has committed acts of infringement there.[29] At common law, where the State statutes permit the practice,[30] and in equity by leave of the court,[31] a receiver of a foreign railroad company may be served by leaving the writ with one of his station agents. A subpœna will not be set aside because addressed to a non-resident over whom the court could exercise jurisdiction with his consent, but not otherwise, although the service upon him

[22] Toland v. Sprague, 12 Pet. 300, 328; Picquet v. Swan, 5 Mason, 35; Bourke v. Amison, 32 Fed. R. 710; Butterworth v. Hill, 114 U. S. 128.

[23] U. S. R. S., §§ 741, 742. See *supra*, § 22.

[24] East Tenn., V. & G. R. Co. v. Atlanta & T. F. R. Co., 49 Fed. R. 508.

[25] Winter v. Ludlow, 3 Phila. 464.

[26] U. S. v. Winans, 73 Fed. R. 72.

[27] Galveston, H. & S. A. Ry. Co. v. Gonzales, 151 U. S. 496. But see Winter v. Ludlow, 3 Phila. 464.

[28] 26 St. at L., § 5, 210.

[29] 20 St. at L., p. 695; *supra*, § 22.

[30] Eddy v. Lafayette, 163 U. S. 456.

[31] Central Tr. Co. v. St. L., A. & T. Ry. Co., 40 Fed. R. 426.

might be set aside.[32] A motion to set side the service,[33] or a motion to quash the return,[34] accompanied by a special appearance for that purpose,[35] is the proper method of testing the sufficiency of the service; unless the defendant prefers to disregard it and subsequently to raise the objection upon an appeal from the decree,[36] or to resist the execution of the decree as void.[37] "Upon the return of the subpœna as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the court, and shall state the time of the entry."[38]

§ 95. Service upon corporations.— If the United States is sought to be made a party defendant, the subpœna should be served upon the Attorney-General or the District Attorney of the district where the suit is brought.[1] "When process at common law or in equity shall issue against a State, the same shall be served on the Governor, or chief executive magistrate, and Attorney-General of such State."[2] When a suit is brought against a domestic corporation, that is, one chartered within the State which contains the district where the suit is brought, the subpœna should be served upon one of its officers; or, where that is impossible, by leaving a copy at its principal place of business; or where it has no place of business nor officers within the State, by service upon its managing agents, or where there is no agent there, perhaps upon one of its stockholders.[3] The State practice in such cases, although not binding upon the Federal courts in equity, furnishes a guide which they are apt to follow.[4] It has been held in Pennsylvania, that, in the absence of an express provision in its charter, a corporation created by an act of Congress can be sued by service upon its

[32] Mason v. N. Y. Steam Power Co., 87 Fed. R. 241.

[33] Ibid.; Bourke v. Amison, 32 Fed. R. 710.

[34] Am. Cereal Co. v. Eli P. C. Co., 70 Fed. R. 276.

[35] *Infra*, §§ 100, 101.

[36] O'Hara v. McConnell, 93 U. S. 150; Butterworth v. Hill, 114 U. S. 128.

[37] Meyer v. Kuhn (C. C. A.), 65 Fed. R. 705.

[38] Equity Rule 16.

§ 95. [1] Hoffman's Ch. Pr. 108; Daniell's Ch. Pr. (2d Am. ed.) 517, note 4.

[2] Supreme Court Rule 5; Grayson v. Virginia, 3 Dall. 320; *supra*, § 14.

[3] Daniell's Ch. Pr. (1st Am. ed.) 564. "If a bill be filed against a corporation the process must be served upon some one of the members." Citing Hinde's Ch. Pr. 87, which uses the same words. But see St. Clair v. Cox, 106 U. S. 353, 359; Rand v. Proprietors, etc. Co., 3 Day (Conn.), 441; O'Brien v. Stair's F. & T. C. Co., 10 Cal. 343.

[4] Eby v. Northern Pac. R. Co., 18 Phila. 144. But see *infra*, § 360.

president in any State.[5] An irregularity in service upon the agent of a corporation may be validated by his admission of service.[6]

When the jurisdiction rests solely upon the existence of a Federal question in a case which is not brought for the infringement of a patent, nor against a surety company, nor under the statute against combinations in restraint of commerce, a Circuit Court of the United States has no jurisdiction over a foreign corporation[7] which is not an alien. But when the defendant is an alien corporation,[8] or when jurisdiction is claimed on account of a difference of citizenship, a foreign corporation may be served with process in the State of the complainant's residence, provided it be "found" within the district.[9] What constitutes such a finding is a matter hard to define with accuracy. If a State statute forbids a foreign corporation to transact business within her borders except upon condition that the corporation stipulate to allow legal process to be served upon it, and the company execute such a stipulation, not in express terms restricted to the process of a State court, it will be considered to apply to the Federal courts; and a subpœna from a Federal court may be served upon the foreign corporation in the same manner as a similar process of a State tribunal.[10] Such condition and stipulation may be implied as well as expressed.[11] If a State permits a foreign corporation to do business within her limits, and at the same time provides that, in suits against it for business there done, process shall be served upon its agents, the provision is deemed to be a condition of the permission; and corporations that subsequently do business in the State are deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of the process.[12] Such condition must not, how-

[5] Thornburgh v. Savage Mining Co., 1 Pac. Law Mag. 267. See *infra*, § 360.

[6] Union Pac. Ry. Co. v. Novak (C. C. A.), 61 Fed. R. 573. Not, however, one by a statutory agent. Farmer v. Nat. Life Ass'n, 50 Fed. R. 829.

[7] McCormick H. M. Co. v. Walthers, 134 U. S. 41; In re Keasby & Mattison Co., 160 U. S. 221; *supra*, § 22.

[8] In re Hohorst, 150 U. S. 653; Barrow S. S. Co. v. Kane, 170 U. S. 100.

[9] McCormick H. M. Co. v. Walthers, 134 U. S. 41; *supra*, § 22.

[10] Ex parte Schollenberger, 96 U. S. 369, overruling several cases to the contrary previously decided in the Circuit Courts.

[11] St. Clair v. Cox, 106 U. S. 350, 356.

[12] Mr. Justice Field in St. Clair v. Cox, 106 U. S. 350, 356. See also Hayden v. Androscoggin Mills, 1 Fed. R. 93; Estes v. Belford, 22 Fed. R. 275.

ever, encroach upon that principle of natural justice which requires notice of a suit to a party before he can be bound by it. It must be reasonable, and the service provided for should be only upon such agents as may be properly deemed representatives of the foreign corporation. Service upon an agent who stood in no representative character to the company, whose duties were limited to those of a subordinate employee, or to a particular transaction, or whose agency had ceased when the matter in dispute arose, would, probably, be held insufficient.[13] Where the State statute permitted such a practice, it was held that service upon an agent of a foreign corporation who had been sent into the State to negotiate with the plaintiff for a settlement of the controversy was sufficient.[14] In order thus to subject itself to the service of process the foreign corporation must actually transact business in the district where the suit is brought.[15] An insurance company does not cease to do business in a State when it receives premiums upon policies previously issued there; although such premiums are sent by the insured to an agent in another State, and the company issues no new policies in the former State.[16] A single act of business, such as the making of a contract there for the sale of an article to be manufactured elsewhere and there delivered, would not be sufficient, "when there was no purpose to do any other business or to have a place of business" within the district.[17] So, it has been held that the presence of the principal officers of a corporation in a foreign State, when they have with them

[13] St. Clair v. Cox, 106 U. S. 350, 359, 360; Mexican C. Ry. Co. v. Pinkney, 149 U. S. 194; Maxwell v. Atchison, T. & S. F. R. Co., 34 Fed. R. 286; Carron Iron Co. v. McClaren, 5 H. L. C. 416. In Evansville Courier Co. v. United Press, 74 Fed. R. 918, service upon the agent of a news association who was paid by the item for furnishing news from the State capital was held insufficient to acquire jurisdiction over the foreign corporation.

[14] Connecticut Mut. Life Ins. Co. v. Spratley, 172 U. S. 602.

[15] Cooper Mfg. Co. v. Ferguson, 113 U. S. 727; Hayden v. Androscoggin Mills, 1 Fed. R. 93; Zambrino v. Galveston, H. & S. A. Ry. Co., 38 Fed. R. 449; Riddle v. N. Y., L. E. & W. R. Co., 39 Fed. R. 290; Maxwell v. Atchison, T. & S. F. R. Co., 37 Fed. R. 286; Filli v. D., L. & W. R. Co., 37 Fed. R. 65; Denton v. International Co. of Mexico, 36 Fed. R. 1; Block v. Atchison, T. & S. F. R. Co., 21 Fed. R. 529.

[16] Connecticut Mut. Life Ins. Co. v. Spratley, 172 U. S. 602.

[17] Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 735; Good Hope Co. v. Railway B. F. Co., 22 Fed. R. 635; Maxwell v. Atchison, T. & S. F. R. Co., 34 Fed. R. 286. *Cf.* Doe v. Springfield B. Co. (C. C. A.), 104 Fed. R. 684; Eirich v. Donnelly C. Co. (C. C. A.), 105 Fed. R. 1.

property of the corporation merely for the purpose of exhibition, does not make the corporation liable to the service of process upon them there.[18] The lease by a foreign to a domestic corporation of personal property, and the payment by the latter to the former of a part of the profits derived from the use of such property within the jurisdiction of the court, does not give the court jurisdiction over the foreign corporation, upon service of a subpœna upon the latter as its agent.[19] The negotiation of loans upon a mortgage, and a successful application to have the bonds thereby secured listed on the stock exchange, are not sufficient acts of business to authorize service of process upon its president for the corporation while he is temporarily within the State for those purposes.[20] A surety company may be served in any district where it is found in a suit upon a bond or undertaking given in such district under the statutes of the United States.[21] Service upon a surety company is made upon its agent in the district appointed by it for that purpose or in his absence, or, in case there is no such appointment, by service upon the clerk of the court where the suit is brought.[22] Service of process in the manner prescribed by the State practice may subject a foreign corporation to the jurisdiction of the Federal court, in a case over which the State statutes deprive her courts of jurisdiction because the cause of action arose without the State.[23] It has been said, however, "that in the absence of a voluntary appearance, three conditions must concur or co-exist in order to give the Federal courts jurisdiction *in personam* over a corporation created without the territorial limits of the State in which the court is held, viz: (1) It must appear as a matter of fact that the corporation is

[18] Carpenter v. Westinghouse Air-Brake Co., 32 Fed. R. 434. See Reifsnider v. American Imp. Pub. Co., 45 Fed. R. 433.

[19] U. S. v. Am. B. Tel. Co., 29 Fed. R. 17.

[20] Clews v. Woodstock Iron Co., 44 Fed. R. 31. Where the books for the transfer of the stock of a Minnesota railway company were kept in the city of New York, it was held that the corporation might be served with process there. Westinghouse A. B. Co. v. Great N. Ry. Co. (C. C. A.), 88 Fed. R. 258.

[21] 28 St. at L., p. 279.

[22] Ibid.

[23] Carstairs v. Mechanics' & Traders' Ins. Co. of N. Y., 18 Fed. R. 823. It seems that by the common law a court has jurisdiction over a foreign corporation to enforce a cause of action arising in the jurisdiction. Newby v. Von Opper, etc. Co., L. R. 7 Q. B. 293.

carrying on its business in such foreign State or district; (2) that such business is transacted or managed by some agent or officer appointed by and representing the corporation in such State; and (3) the existence of some local law making such corporation, or foreign corporations generally, amenable to suit there, as a condition, express or implied, of doing business in the State.[24] It has been held that the Superintendent of the Insurance Department of the State of New York cannot be served by mail; and that he has no power to waive a defect in the service of process upon him so as to bind a foreign insurance company.[25] It has been held that upon a motion to set aside service upon a foreign corporation because the writ was not served upon the proper person, the defendant need not show upon whom the service should be made or that it has no agent in the district.[26]

§ 96. Substituted service of a subpœna.— Independently of any express statutory authority, there is no power in a court of equity to order actual personal service to be effected upon a defendant beyond its territorial jurisdiction;[1] but, in a few cases, such courts have for more than a century assumed the power of ordering service to be made within their jurisdiction upon some person for the absent defendant, and have treated such service as valid.[2] In suits to stay proceedings at law in the same court, the service of a subpœna upon the attorney of the plaintiff at law may be allowed, and it will then bind the latter if he be beyond the territorial jurisdiction of the court.[3] It has been held that this cannot be done after the judgment at law has been enforced, since the attorney's authority to represent

[24] U. S. v. Am. B. Tel. Co., 29 Fed. R. 17, 35, per Jackson, J. See Maxwell v. Atchison, T. & S. F. R. Co., 34 Fed. R. 286, 289.

[25] Farmer v. National Life Ass'n, 50 Fed. R. 829.

[26] Wall v. Chesapeake, etc. Ry. Co. (C. C. A.), 95 Fed. R. 398, Ward, J., dissenting.

§ 96. [1] This passage was quoted and approved by Maxey, J., in Batt v. Proctor, 45 Fed. R. 515, 516.

[2] Hales v. Sutton, 1 Dickens, 26; s. c. *sub nom.* Hallett v. Sutton, 12 Simons, 145, note; Carter v. De Brune, 1 Dickens, 89; Hyde v. Forster, 1 Dickens, 102; Lady Carrington v. Cantillon, Bunb. 107; Hobhouse v. Courtney, 12 Simons, 140, and cases there cited; Daniell's Ch. Pr. (2d Am. ed.) 502–508.

[3] Dunn v. Clarke, 8 Pet. 1; Hitner v. Suckley, 2 Wash. 465; Eckert v. Bauert, 4 Wash. 370; Ward v. Seabry, 4 Wash. 426; Read v. Consequa, 4 Wash. 174; Bartlett v. Sultan of Turkey, 19 Fed. R. 346. See also Logan v. Patrick, 5 Cranch, 288; Dunlap v. Stetson, 4 Mason, 349.

his client is then terminated.[4] A similar practice would in all probability be allowed in serving process under bills not original; namely, bills of revivor, supplemental bills, and bills of revivor and supplement, which are nothing more than continuations of the suits upon which they operate.[5] So, it has been held that, under a bill to reform an insurance policy pending an action at law upon the policy, a subpœna may be thus served upon the attorney for the party to the action at law;[6] and that under a bill to collect out of equitable assets a decree of the same court of equity for costs, such service of a notice without a subpœna is sufficient.[7] The Federal courts have refused to extend this class of cases so as to include a bill of interpleader, two of the defendants to which were engaged in an action between themselves in the same court concerning the same matter,[8] although in England such a mode of service might have been allowed.[9] Nor, it seems, can a subpœna thus be served under a bill to set aside a sale made under a decree of the same court to which persons are joined as defendants who were not parties to the former suit.[10] Substituted service of a subpœna to appear and answer to a cross-bill has been allowed,[11] but not when the cross-bill sought to introduce new and distinct matters into the original suit.[12] The safer practice when a defendant to a cross-bill cannot be served personally seems to be to procure an order staying his proceedings in the original cause until he answers the cross-bill.[13] Substituted service of process

[4] Kamms v. Stark, 1 Sawyer, 547.

[5] Norton v. Hepworth, 1 H. & T. 158; Dunn v. Clarke, 8 Pet. 1. But see Henderson v. Meggs, 2 Brown Ch. C. 127; Anderson v. Lewis, 3 Brown Ch. C. 429; Gardiner v. Mason, 4 Brown Ch. C. 478. This passage was quoted with approval by Morrow, J., in Shainwald v. Davids, 69 Fed. R. 701. 703.

[6] Abraham v. North German Fire Ins. Co., 87 Fed. R. 731.

[7] Maitland v. Gibson, 79 Fed. R. 136.

[8] Herndon v. Ridgway, 17 How. 424. See § 88.

[9] Martinius v. Helmuth, G. Cooper, 248; Stevenson v. Anderson, 2 Ves. & B. 407. See § 88.

[10] Pacific R. Co. of Mo. v. Mo. Pac. Ry. Co., 3 Fed. R. 772; s. c. on appeal, 111 U. S. 505, 522.

[11] Johnson R. R. S. Co. v. Union S. & S. Co., 43 Fed. R. 331; § 178; Kingsbury v. Buckner, 134 U. S. 650, 676; Lowenstein v. Glidewell, 5 Dill. 325; Sawyer v. Gill, 3 Woodb. & M. 97; Segee v. Thomas, 3 Blatchf. 11; Hitner v. Suckley, 2 Wash. 465; Anderson v. Lewis, 3 Brown Ch. C. 429; Gardiner v. Mason, 4 Brown Ch. C. 478; Waterton v. Croft, 5 Simons, 502; *infra*, § 173.

[12] Rubber Co. v. Goodyear, 9 Wall. 307; Heath v. Erie Ry. Co., 9 Blatchf. 316. But see Kingsbury v. Buckner, 134 U. S. 650, 676. See *infra*, § 173.

[13] Sawyer v. Gill, 3 W. & M. 97; Segee v. Thomas, 3 Blatchf. 11; Hit-

or notice upon a petition of intervention is allowed in the same cases in which it would be allowed upon a cross-bill.[14] Substituted service has also been allowed in England upon the agent of a defendant beyond the jurisdiction, who had authority to represent the latter with respect to the property which was the subject of the suit.[15] When substituted service is wished, an order must be obtained that service upon the attorney employed in the former suit or action shall be deemed good service.[16] If service be made upon the attorney without such an order having been obtained, it may be set aside,[17] and all subsequent proceedings will be void.[18] The motion for such an order ordinarily may be *ex parte*.[19] It must be supported by an affidavit, made by the plaintiff or by some person having personal knowledge of the facts therein stated, setting forth the reasons why such service is necessary and verifying the allegations of the bill.[20] Written admissions of the defendant may, however, be sufficient to support the motion without such affidavit.[21] A previous request of the attorney and his refusal to accept service of the subpœna are not a necessary preliminary to such a motion.[22] Where the bill is demurrable for want of equity, the motion for substituted service may be denied.[23] Where the order has been improvidently made, it may be set aside on motion at the same term.[24]

§ 97. Statutory service of a subpœna.— The statutes of the United States, which in this respect are analogous to those of

ner v. Suckley, 2 Wash. 465; Anderson v. Lewis, 3 Brown Ch. C. 429; Gardiner v. Mason, 4 Brown Ch. C. 478; Waterton v. Croft, 5 Simons, 502.

[14] Fidelity T. & S. D. Co. v. Mobile St. Ry. Co., 53 Fed. R. 850; *infra*, §§ 201, 202.

[15] Hobhouse v. Courtney, 12 Sim. 140; Fidelity T. & S. D. Co. v. Mobile St. Ry. Co., 53 Fed. R. 850; Gasquet v. Fidelity T. & S. V. Co. (C. C. A.), 57 Fed. R. 80; Gregory v. Pike, 79 Fed. R. 520.

[16] Pacific Ry. Co. of Mo. v. Mo. Pac. Ry. Co., 3 Fed. R. 772; s. c., 1 McCrary, 647; Daniell's Ch. Pr. (2d Am. ed.) 502.

[17] Ibid.

[18] Gregory v. Pike, 79 Fed. R. 520.

[19] Daniell's Ch. Pr. (2d Am. ed.) 502. But see Crew v. Martin, 1 Fowler Ex. Pr. 225.

[20] Pacific Ry. Co. of Mo. v. Mo. Pac. Ry. Co., 3 Fed. R. 772; s. c., 1 McCrary, 647; Delancy v. Wallis, 3 Brown's C. C. 12; Stephen v. Cini, 4 Ves. 359; Kenworthy v. Accunor, 3 Madd. 550.

[21] Royal Exch. Ins. Co. v. Ward, 1 Fowler Ex. Pr. 225.

[22] French v. Roe, 13 Ves. 593.

[23] Muhlenburg County v. Citizens' Nat. Bank, 65 Fed. R. 537.

[24] Fidelity T. & S. D. Co. v. Mobile St. Ry. Co., 53 Fed. R. 850.

England,[1] provide, "That when in any suit, commenced in any court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon, the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit, and under the jurisdiction of the court therein, within such district; and when a part of the said real or personal property against which such proceeding shall be taken shall be within another district, but within the same State, said suit may be brought in either district in said State: *Provided, however*, That any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said Circuit Court, and thereupon the said court shall make an order setting aside the judgment therein, and permitting said defendant or defendants to plead therein on payment by him

§ 97. [1] 2 Wm. IV, ch. 33; 4 & 5 Wm. IV, ch. 82.

or them of such costs as the courts shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law."[2]

[2] U. S. R. S., § 738; as amended by act of March 3, 1875, ch. 137, § 8 (18 St. at L. 472). All statutes which authorize proceedings against absent defendants and unknown heirs upon service by publication must be strictly followed. Hunt v. Wickliffe, 2 Pet. 201; Boswell v. Otis, 9 How. 336.

In Karr v. Karr, 19 N. J. Eq. 427, the court said: "Two substantial parts of the notice are that it shall *not* be entitled in the cause and *shall* be directed to the defendant. The notice published is entitled in the cause and is not directed to the defendant, although he was named in the title." It was held in Corrigan v. Schmidt, 126 Mo. 304, 28 S. W. R. 874, that service by publication against "Owen Corrigan" and "Elisha Corrigan" did not bind John Owen Corrigan and Elizabeth Alicia Corrigan. In Colton v. Rupert, 60 Mich. 318, 27 N. W. R. 520, that a publication against "Grant B. Hunt" did not bind Garrett B. Hunt; in Entrekin v. Chambers, 11 Kan. 368, that service by publication against "Robert Brimford" did not bind Robert Binford; in Chamberlain v. Blodgett, 96 Mo. 482, 10 S. W. R. 44, that a publication against "M. B. Miller" did not bind M. B. Millen, although the tract books of the county gave the name of the landowner as Miller; in Marx v. Hanthorn, 148 U. S. 172, that notice of the sale for taxes of the property of "Ida J. Hawthorn" gave no jurisdiction over the property of Ida J. Hanthorn. In Meyer v. Kuhn, 65 Fed. R. 705 (C. C. A., per Fuller, C. J.), it was held that publication of a summons against "Sarah E. Meyers, and the unknown heirs of Henry Meyers, deceased," was insufficient to acquire jurisdiction over Elizabeth Meyer, who was the executrix and devisee of Henry Meyer, deceased, and was so described in the bill; in Gonzalia v. Barelsman, 143 Ill. 634, 32 N. E. R. 532, that an affidavit referring to "Fred Meyers" could not be construed as applicable to Fred Meyer. But see Smurr v. State, 88 Ind. 504; in Hardester v. Sharretts, 84 Md. 146, 34 Atl. R. 1122, that where a bill was filed "against the unknown heirs of the children of Benjamin Hardester, deceased," a publication summoning the children of Abraham Hardester was insufficient, although they were the persons referred to in the bill and came within that description, Abraham being the son of Benjamin. In Purdy v. Henslee, 97 Ill. 389, it was held that a publication addressed to "the unknown heirs and legal representatives of Thomas Osborn, deceased," was insufficient to bring the heirs at law of Susanna Osburn before the court, although her heirs at law were the same as those of Thomas. In Ferriss v. Louis, 2 Tenn. Ch. 291, it was held that a publication against the unknown heirs of Doolin did not bring before the court Doolin's devisees in remainder. But in Steinmann v. Strimple, 29 Mo. App. 478, it was held that an order intended for Benjamin F. S. was sufficient when directed to Frank S., that being the name by which Benjamin was usually known. In Lane v. Innes, 43 Minn. 137, 45 N. W. R. 4, that a change of the name of "Berlah M. Plimpton" to "Beulah M. Plimpton" was not fatal; in White v. McClellan, 62 Md. 347, that the omission of a middle initial of a party's name did not invalidate the notice; and in Fanning v. Krapfl, 61 Iowa, 417; s. c., 68 Iowa, 544, 14 N. W. R. 727, 16 N. W. R. 293, 26 N. W.

The statute applies, although there is but one defendant.[3] It is no defense to such a suit that neither of the defendants thus served, nor the plaintiff, is a resident of the district.[4] Nor, it has been held, that the property in question has been attached by a State sheriff.[5] Process can thus be served in an action of ejectment,[6] in a suit to foreclose a railway[7] or other mortgage;[8] but not so as to justify a decree for the deficiency against a mortgagor who does not appear;[9] in a suit to quiet title;[10] for example, a suit by the United States to cancel land patents,[11] or by an individual to cancel a deed, obtained from him by duress and fraud,[12] or by the creditors of a corporation to set aside a conveyance of its land and a mortgage of its personalty, and also to obtain a dissolution of the corporation and a receiver;[13] but not in a suit to set aside a

R. 188, and Buchanan v. Roy's Lessee, 2 Ohio St. 257, that the publication was sufficient where the names were incorrectly spelled but they were accompanied by another description which made the identification clear. In Fanning v. Krapfl, 61 Iowa, 417, 420, the court said: "A published notice is not necessarily sufficient if it is such that the defendant, upon actually seeing it, would probably conclude that it was intended for him. The office of the notice is in part to give the pendency of the action notoriety. It should be such that others than the defendant, seeing it and knowing the defendant, or knowing of him, would not probably be misled by it as to the person for whom it was intended." In Detroit v. Detroit City Ry. Co., 54 Fed. R. 1, it was held that where the advertisement named the defendant as "The Washington Trust Co.," a Michigan court did not acquire jurisdiction over "The Washington Trust Co." of the City of New York. In Pana v. Bowler, 107 U. S. 529, it was held that the publication by an Illinois court of a notice to the "unknown holders and owners of bonds issued by the town of Pana" was insufficient to acquire jurisdiction over non-resident bondholders.

[3] Ames v. Holderbaum, 42 Fed. R. 341; Wheelwright v. St. L., N. O. & O. C. Tr. Co., 50 Fed. R. 709; *supra*, § 22.

[4] Ibid.

[5] Wheelwright v. St. L., N. O. & O. C. & Tr. Co., 50 Fed. R. 709; *supra*, § 9.

[6] Spencer v. Kansas City S. F. Co., 56 Fed. R. 741.

[7] Farmers' L. & Tr. Co. v. Houston & T. C. Ry. Co., 44 Fed. R. 115. So in a bondholder's suit to enjoin waste of the mortgaged property. Pollitz v. Farmers' L. & Tr. Co., 39 Fed. R. 707.

[8] Du Pont v. Abel, 81 Fed. R. 584.

[9] Ibid.

[10] U. S. v. Southern Pac. Ry. Co., 63 Fed. R. 481; U. S. v. American Lumber Co., 80 Fed. R. 309; Evans v. Charles Scribner's Sons, 58 Fed. R. 303; Duff v. First Nat. Bank, 13 Fed. R. 65.

[11] U. S. v. Southern Pac. Ry. Co., 63 Fed. R. 481; U. S. v. American Lumber Co., 80 Fed. R. 309.

[12] Evans v. Charles Scribner's Sons, 58 Fed. R. 303.

[13] Mellen v. Moline Iron Works, 131

transfer of insurance policies, issued by a foreign insurance company and not within the district although secured by bonds within the district.[14] So in a suit to compel specific performance of a contract to sell real estate in a State whose laws make a decree, where the defendant does not appear, as effectual as a conveyance by him;[15] but where there was no such statute it was held that process could not thus be served;[16] but not in a suit to establish and enforce a right of membership in the Associated Press in a district where the latter corporation is not domiciled, although the right is to be exercised in that district.[17] It has been held that a subpœna cannot thus be served when the main object of the bill is for an accounting by an absent and non-resident defendant, although there is also a prayer for the appointment of a receiver of property within the district;[18] but it seems that service can thus be made in a suit to establish a trust in real estate although the bill also prays an accounting.[19] Process cannot thus be served in a suit to remove a cloud upon the title to a patent-right although the official letters-patent evidencing the patent-right are within the jurisdiction.[20] It has been said that jurisdiction may be thus obtained of a bill to enforce a lien upon shares of the stock of a corporation within the district although the certificates are not there.[21] An absent judgment debtor may thus be served in a suit by the creditor to appropriate his assets.[22] It has been held at Circuit: that an order in pursuance of this statute may be obtained immediately on filing the bill, upon proof by affidavit that the defendant does not dwell within the district, and cannot be served or found

U. S. 852; Single v. Scott Paper Mfg. Co., 55 Fed. R. 553, 557.

[14] Evans v. Charles Scribner's Sons, 58 Fed. R. 808.

[15] Morrison v. Marker, 93 Fed. R. 693.

[16] Municipal Inv. Co. v. Gardiner, 62 Fed. R. 954.

[17] Lawrence v. Times Pr. Co., 90 Fed. R. 24.

[18] Ellis v. Reynolds, 85 Fed. R. 894. But see Porter Land & Water Co. v. Baskin, 43 Fed. R. 823.

[19] Porter Land & Water Co. v. Baskin, 43 Fed. R. 823.

[20] Non-Magnetic Watch Co. v. Association H. S. of Geneva, 44 Fed. R. 6.

[21] Jellenik v. Huron Copper Min. Co., 177 U. S. 1; Merritt v. Am. Steel Barge Co., 79 Fed. R. 228; Ryan v. Seaboard R. Co., 83 Fed. R. 889. *Contra*, Kilgour v. N. O. G. L. Co., 2 Woods, 144.

[22] Brigham v. Luddington, 13 Blatchf. 237. Compare Picquet v. Swan, 5 Mason, 85; s. c., 5 Mason, 561.

therein; where the bill shows that the defendant is a non-resident;[23] that there is need in such a case of a previous attempt to serve a subpœna;[24] that the day named for his appearance need not be one of the rule-days of the court;[25] that personal service of the order must be made in all cases where the residence of the absent defendant is known or can be ascertained, or service upon him can be made within a reasonable time and by the exercise of reasonable diligence; and that its service by publication can only be authorized upon proof by affidavit of the facts showing that personal service without the jurisdiction is impracticable.[26] The affidavit should state the known places of residence of the absent defendants, and show that diligence has been used to ascertain the places of residence which are unknown.[27] The fact that it would be very expensive to make personal service upon the absent defendant whose residence was known was held ground for allowing service by publication.[28] If the absent defendant reside in another district of the United States, the safer practice is to obtain an order directing the marshal of that district to serve him.[29] A misnomer of a defendant, thus served, who does not appear, will invalidate the whole proceedings.[30] A defect in personal service, or the fact that personal service was obtained by fraud, will not prejudice proceedings regularly taken under this statute.[31] This statute does not change the law as to the difference of citizenship essential to jurisdiction.[32] It has been doubted whether it can be applied to a suit removed from a State court.[33] Compliance with State statutes providing for service by publication will not give a Federal court jurisdiction either in law or in equity.[34] An order of a Fed-

[23] Forsyth v. Pierson, 9 Fed. R. 801; U. S. v. American Lumber Co., 80 Fed. R. 309. But see Bronson v. Keokuk, 2 Dill. 498.

[24] Ibid.

[25] Forsyth v. Pierson, 9 Fed. R. 801.

[26] Bronson v. Keokuk, 2 Dill. 498; Batt v. Procter, 45 Fed. R. 515. *Cf.* Marx v. Egner, 180 U. S. 314.

[27] Batt v. Procter, 45 Fed. R. 515. An affidavit sworn to four months previously was held to be insufficient. Spreen v. Delsignore, 94 Fed. R. 71.

[28] Batt v. Procter, 45 Fed. R. 515.

[29] Bronson v. Keokuk, 2 Dill. 498; Forsyth v. Pierson, 9 Fed. R. 801.

[30] Meyer v. Kuhn, 65 Fed. R. 705.

[31] Fitzgerald & M. C. Co. v. Fitzgerald, 137 U. S. 98.

[32] Tug River Coal & Salt Co. v. Brigel, 67 Fed. R. 625.

[33] Adams v. Heckscher, 80 Fed. R. 742, 744.

[34] Bracken v. Union Pac. Ry. Co. (C. C. A.), 75 Fed. R. 347; s. c., 56 Fed. R. 447.

eral court for such service is, when attacked collaterally, at least *prima facie* evidence of the existence of the jurisdicional facts.[35]

§ 98. Exemptions from service of subpœna or other process, legal or equitable, other than arrest.— Chief Justice Marshall, in the course of the trial of Aaron Burr, ordered that a *subpœna duces tecum* should issue against President Jefferson. Jefferson, however, refused to obey the subpœna, while expressing his perfect willingness to furnish the paper desired, if requested in what he considered a proper way. The dispute went no farther.[1] Subsequently, a motion was made for leave to file a bill in the Supreme Court, praying for an injunction against President Johnson to restrain him from executing the reconstruction laws. The Attorney-General then took the position that the President was not amenable to process; but that point was not then and has not since been decided.[2] On the trial of Guiteau for the murder of President Garfield, a written statement signed by President Arthur was admitted in evidence by consent without his personal attendance. No other officer or person has been claimed to be above the law. The Federal Constitution provides that senators and representatives "shall in all cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same."[3] This has been construed at Circuit to exempt them from service of process, unaccompanied by arrest of the person, when on their way to attend a session of Congress;[4] and it has been further held that such exemption is not lost by a slight deviation from the most direct road to the capital.[5] In a State court the privilege has been extended to members of a Constitutional Convention.[6] In certain cases individuals are temporarily exempt from the service of process. A person temporarily within the district for the purpose of

[35] Woods v. Woodson (C. C. A.), 100 Fed. R. 515.

§ 98. [1] Burr's Trial.

[2] Mississippi v. Johnson, 4 Wall. 475. See Jefferson's Works, vol. v, p. 102; *supra*, § 35.

[3] Const., art. I, § 6.

[4] Miner v. Markham, 28 Fed. R. 387.

[5] Miner v. Markham, 28 Fed. R. 387.

[6] Bolton v. Martin, 1 Dallas, 29.

attending, either as witness,[7] party,[8] attorney, or counsel,[9] a trial or other proceeding,[10] civil or criminal,[11] in a State[12] or Federal[13] court, is, while there, exempt from the service of process *eundo, morando, et redeundo.* A similar exemption would probably be applied to any person while temporarily within the district in the discharge of a public duty.[14] The privilege of a witness does not exempt him from liability to service in a suit arising out of his acts upon that same visit to the jurisdiction.[15] A Federal court will not punish as a contempt the arrest or service of process by a State court upon a foreign witness in attendance before it;[16] though it might perhaps upon *habeas corpus* discharge the witness from such arrest,[17] or punish the party who molested the witness, by a stay of proceedings in a case pending between him and the witness in the Federal court.[18] If a person be fraudulently enticed within the district and then served with process by those who thus

[7] Person v. Grier, 66 N. Y. 124, and cases there cited; Kauffman v. Kennedy, 25 Fed. R. 785. Service on a foreign corporation by serving its secretary while attending court as witness in the corporation's litigation was held invalid. American Wooden-Ware Co. v. Stein, 63 Fed. R. 676.

[8] Parker v. Hotchkiss, 1 Wall. Jr. 269; Juneau Bank v. McSpedan, 5 Biss. 64; Matthews v. Tufts, 87 N. Y. 568; Brooks v. Farwell, 2 McCrary, 220; s. c., 4 Fed. R. 167; Bridges v. Sheldon, 7 Fed. R. 17; Matthews v. Puffer, 10 Fed. R. 606; Larned v. Griffin, 12 Fed. R. 590. A suitor attending a hearing on a demurrer in a foreign jurisdiction, to consult with his counsel, is privileged from service of process. Kims v. Lant, 68 Fed. R. 486. A service of process, made upon a party attending especially the trial of a case in another State, was set aside by a Federal court, although the suit was begun in a court of the State whose courts hold such service good. Holt v. Wharton (C. C. A.), 73 Fed. R. 892.

[9] Matthews v. Tufts, 87 N. Y. 568.

[10] U. S. v. Bridgman, 8 Am. Law Record, 541; Newton v. Askew, 6 Hare, 319; Matthews v. Tufts, 87 N. Y. 568; Parker v. Marow, 136 N. Y. 585.

[11] U. S. v. Bridgman, 8 Am. L. Rec. 541. But see Jenkins v. Smith, 57 How. Pr. (N. Y.) 171.

[12] Juneau Bank v. McSpedan, 5 Biss. 64; Matthews v. Tufts, 87 N. Y. 568.

[13] Parker v. Hotchkiss, 1 Wall. Jr. 269; U. S. v. Bridgman, 8 Am. L. Rec. 541; Brooks v. Farwell, 2 McCrary, 220; s. c., 4 Fed. R. 167; Bridges v. Sheldon, 7 Fed. R. 17; Matthews v. Puffer, 10 Fed. R. 606; Larned v. Griffin, 12 Fed. R. 590.

[14] Lyell v. Goodwin, 4 McLean, 29.

[15] Nichols v. Horton, 14 Fed. R. 827.

[16] Ex parte Schulenburg, 25 Fed. R. 211.

[17] Ex parte Hurst, 1 Wash. C. C. 186. See Ex parte Schulenburg, 25 Fed. R. 211, 212.

[18] Bridges v. Sheldon, 7 Fed. R. 17, 42; Ex parte Schulenburg, 25 Fed. R. 211, 212.

induced him to come, the service may be set aside.[19] In one case, when a man was induced by a forged telegram to enter the jurisdiction of the court, the party who served him there was held to be presumptively connected with the fraud.[20] It has been held that a party to a suit in a State court is not on his journey there exempt from service of process in another State.[21] A judgment is not void so that it can be attacked collaterally, where process was served upon a party while attending a trial.[22]

[19] Union Sugar Refinery v. Mathiesson, 2 Cliff. 304; Steiger v. Boon, 4 Fed. R. 17; Blair v. Turtle, 5 Fed. R. 894; s. c., 23 Alb. L. J. 435; Baker v. Wales, 15 Abb. Pr. N. S. (N. Y.) 331; Fitzgerald & M. C. Co. v. Fitzgerald, 137 U. S. 98, 105.

[20] Steiger v. Bonn, 4 Fed. R. 17.

[21] Holyoke & S. H. F. I. Co. v. Ambden, 55 Fed. R. 598.

[22] Walker v. Collins, 59 Fed. R. 470.

CHAPTER VI.

APPEARANCE.

§ 99. Definition of an appearance.— An appearance is the process by which a defendant submits himself to the jurisdiction of the court. An appearance is either general or special. By a general appearance a defendant appears for all purposes in the suit. By a special appearance he appears solely for the purpose of objecting to the jurisdiction on account of a defect, omission, or irregularity in the service of the subpœna upon him, or perhaps for some other jurisdictional defect.[1] An appearance *gratis* is an appearance by a defendant who has not been served with process.[2]

§ 100. What constitutes an appearance.— The proper method of entering an appearance is to deliver to the clerk a præcipe, that is, a written direction, ordering him to enter the appearance of the defendant who subscribes it.[1] A defendant may appear in person[2] or by his attorney. No attorney-at-law can appear in a court of the United States unless authorized by a power of attorney, if he is not a member of the bar of such court. The rules as to admission to the bar of the District and Circuit Courts vary with the different courts. It is the usual practice to recognize in each District and Circuit Court a member of the bar of the Supreme Court of the United States as a member of the bar of such inferior court without requiring any formal order or motion for his admission.[3] The Circuit Court of the United States for the Southern District of New York[4] and the district of New Jersey have, it is understood, in one or more cases refused to recognize members of the bar of the Supreme Court of the United States who had not been

§ 99. [1] National F. Co. v. Moline Malleable I. Works, 18 Fed. R. 863; Elliott v. Lawhead, 48 Ohio St. 171; Dorr v. Gibboney, 3 Hughes, 382; U. S. v. Am. B. T. Co., 29 Fed. R. 17.

[2] Daniell's Ch. Pr. (2d Am. ed.) 590–595.

§ 100. [1] Daniell's Ch. Pr. (2d Am. ed.) 590, 591.

[2] U. S. R. S., § 747.

[3] See Goodyear D. V. Co. v. Osgood, 18 Off. Gaz. 825.

[4] See Matter of Joseph Wood, *infra*, § 867.

admitted to practice there; but this practice is not usually adopted. The taking of any proceeding,[5] other than a special appearance and a motion or plea founded thereupon, is equivalent to a general appearance and a submission of the defendant's person to the jurisdiction of the court.[6] Such are the obtaining of an order extending the time "to plead, answer, or take such action as he may be advised;"[7] a petition of intervention, even where the petitioner disclaims any intention to be made a party;[8] a special appearance, accompanied by an answer to the merits;[9] and, it has been held, a special appearance accompanied by a motion to set aside an order reviewing a judgment upon the ground of an irregularity in the proceedings.[10] Where the defendant, appearing specially for that purpose, moved to quash a return of service of a summons and prayed judgment whether it should be compelled to plead on the ground that it was a non-resident corporation, it was held that the appearance was not thereby made general.[11] A removal of a cause from a State to a Federal court is not a general appearance whether or not the petitioner states that he appears specially for the purpose of the removal only.[12] A stipulation by the defendant's solicitor to answer waives the

[5] Jones v. Andrews, 10 Wall. 327; Thornburgh v. Savage M. Co., 1 Pac. Law Mag. 267; Livingston v. Gibbons, 4 J. Ch. (N. Y.) 94, 99.

[6] New Jersey v. New York, 6 Pet. 328; Van Antwerp v. Hulburd, 7 Blatchf. 426, 440; Livingston v. Gibbons, 4 J. Ch. (N. Y.) 94; Blackburn v. Selma, M. & M. R. Co., 2 Flippin, 525; Fitzgerald & M. Const. Co. v. Fitzgerald, 137 U. 98; *infra*, § 101.

[7] Hupfeld v. Automaton Piano Co., 66 Fed. R. 788. See Briggs v. Stroud, 58 Fed. R. 717. So held of a stay of proceedings pending a motion to vacate a judgment. Crane v. Penny, 2 Fed. R. 187.

[8] Bowdoin College v. Merritt, 59 Fed. R. 6; Jack v. D. M. & Ft. D. R. Co., 49 Iowa, 627; Frank v. Wedderin (C. C. A.), 68 Fed. R. 818.

[9] Caskey v. Chenoweth (C. C. A.), 62 Fed. R. 712. Or a plea in bar. Texas & Pac. Ry. Co. v. Saunders, 151 U. S. 105; Hankinson v. Page, 31 Fed. R. 184.

[10] Crawford v. Foster, 84 Fed. R. 989.

[11] N. K. Fairbanks & Co. v. Cincinnati, N. O. & T. P. Ry. Co. (C. C. A.), 54 Fed. R. 420; Am. Cereal Co. v. Eli Pettijohn C. Co., 70 Fed. R. 276. It is said in the Encyclopedia of Pleading and Practice, article II, section 626, that "where a party appears in court and objects to the jurisdiction of the court over his person, he must state specifically the grounds of objection; by not so stating them his appearance will be construed a general one, although he moves to dismiss on that ground." Citing Bell Bros. v. White Lake Lumber Co., 21 Neb. 525; Aultman v. Steinman, 8 Neb. 109; Bucklin v. Strickler, 32 Neb. 602; Layne v. Ohio River R. Co., 35 W. Va. 488.

[12] Goldey v. Morning News, 156 U. S. 518; Wabash W. R. Co. v. Brow, 164 U. S. 271; National Accident So-

issue and service of a subpœna.[13] The defense by its attorneys at its expense of a suit against another in pursuance of a contract with him is not an appearance by a foreign corporation; nor will it support an application by the plaintiff to make it a party.[14] The Texas statute which provides that a special appearance for the sole purpose of questioning the jurisdiction is equivalent to a general appearance is constitutional;[15] but it does not bind the Federal courts at law or in equity even in a case originally instituted in a State court and brought into a court of the United States by removal.[16] A special appearance, it would seem, is only properly made by special leave of the court obtained by an *ex parte* motion,[17] and it is the safer practice to accompany it with an undertaking by the defendant to abide by the further orders of the court.[18] By styling a paper a special appearance the draftsman does not prevent the appearance from becoming general.[19] An appearance *gratis* can only be made by a defendant named in the introduction or prayer for process in the bill, unless by consent of all the parties to the suit.[20]

§ 101. Effect of an appearance.— A general appearance waives all objections to the form or manner of service of the subpœna,[1] including, usually, the objection that the defendant

ciety v. Spiro, 164 U. S. 281; *infra*, § 391.

[13] Seattle v. U. Tr. Co., 79 Fed. R. 179. The indorsement and signature by a defendant upon a subpœna of the words, "I hereby accept service of the within subpœna, to have the same effect as if duly served on me by a proper officer, and do hereby acknowledge the receipt of a copy thereof," is not equivalent to an appearance. Butterworth v. Hill, 114 U. S. 128, 132, 133.

[14] Bidwell v. Toledo Canal St. Ry. Co., 72 Fed. R. 10.

[15] York v. Texas, 137 U. S. 15.

[16] Southern Pacific Co. v. Denton, 146 U. S. 202; Mexican Central Ry. Co. v. Pinckney, 149 U. S. 194; Galveston, H. & S. A. Ry. Co. v. Gonzales, 151 U. S. 496.

[17] Thayer v. Wales, 5 Fisher's Pat. Cas. 448; Romaine v. Union Ins. Co., 28 Fed. R. 625. But see Dorr v. Giboney, 3 Hughes, 382; National F. Co. v. Moline M. I. Works, 18 Fed. R. 868.

[18] Romaine v. Union Ins. Co., 28 Fed. R. 625.

[19] Crawford v. Foster, 84 Fed. R. 989; Caskey v. Chenoweth (C. C. A.), 62 Fed. R. 712.

[20] Attorney-General v. Pearson, 7 Simons, 290, 302; Kentucky S. Min. Co. v. Day, 2 Saw. 468, 473. See Anderson v. Watt, 138 U. S. 694; Beck & Plith Co. v. Wacker & B. B. & M. Co. (C. C. A.), 76 Fed. R. 10; Roberts v. Brooks, 71 Fed. R. 914.

§ 101. [1] Segee v. Thomas, 3 Blatchf. 11; Goodyear v. Chaffee, 3 Blatch. 268; Hale v. Continental L. Ins. Co., 12 Fed. R. 359; Provident Sav. L. Assur. Soc. v. Ford, 114 U. S. 635, 639; Robinson v. Nat. S. Co., 12 Fed. R.

was not "found" and did not reside within the district.[2] Where the fact that the defendant does not reside in the district appears upon the face of the plaintiff's pleading, the want of jurisdiction may be raised by demurrer and is not waived by answer after a demurrer upon this ground has been improperly overruled.[3] A general appearance also waives an omission of the name of the defendant from the prayer of process, provided he was named in another part of the bill.[4] A general appearance does not waive an objection to the jurisdiction of the court upon the ground of a lack of the requisite difference of citizenship.[5] A general appearance does not admit the validity of a writ of foreign attachment previously issued.[6] If a party joins with a special appearance and motion to set aside service of process a motion to dismiss the suit on another ground, he thereby waives his objection to the irregularity of service, and his proceeding is equivalent to a general appearance.[7] After a special appearance for the purpose of objecting to the jurisdiction has been made, and the objection overruled, the right to insist upon this objection on an appeal is not lost by a subsequent appearance and defense to the suit upon the merits.[8] The court has power to allow a general appearance

361; s. c., 20 Blatchf. 513; Buerk v. Imhaeuser, 8 Fed. R. 457.

[2] St. Louis & S. F. Ry. Co. v. McBride, 141 U. S. 127, 132; Sayles v. Northwestern Ins. Co., 2 Curt. 212; Shields v. Thomas, 18 How. 253, 259; Toland v. Sprague, 12 Pet. 300, 331; Provident Sav. L. Assur. Soc. v. Ford, 114 U. S. 635, 639; Central Tr. Co. v. McGeorge, 151 U. S. 129; Int. Constr. & I. Co. v. Gibney, 160 U. S. 217; Texas & Pac. Ry. Co. v. Saunders, 151 U. S. 105. But see Noyes v. Canada, 30 Fed. R. 665; Reinstadler v. Reeves, 33 Fed. R. 308. Held, that a general appearance waived the objection that the defendants were not residents of the district. Lowry v. Tile M. & G. Ass'n, 98 Fed. R. 817.

[3] Southern Pac. R. Co. v. Denton, 146 U. S. 202. So held where a general appearance was made, after the service of a summons, but before a pleading was filed or served, and the defendant did not then know that the sole ground of jurisdiction was a diversity of citizenship. Crown Cotton Mills v. Turner (S. D. N. Y.), 82 Fed. R. 337.

[4] Segee v. Thomas, 3 Blatchf. 11; Buerk v. Imhaeuser, 8 Fed. R. 457.

[5] Romaine v. Union Ins. Co., 28 Fed. R. 625; U. S. R. S. 1 Supp., pp. 173, 175; 18 St. at L. 470; Act of March, 3, 1875, § 5.

[6] Sackett v. Rumbaugh, 45 Fed. R. 23.

[7] Fitzgerald & M. C. Co. v. Fitzgerald, 137 U. S. 98; Jones v. Andrews, 10 Wall. 327; St. Louis & S. F. Ry. Co. v. McBride, 141 U. S. 127, 132; Edgell v. Felder (C. C. A.), 84 Fed. R. 69. But see U. S. v. Am. Bell Tel. Co., 29 Fed. R. 17; McGillin v. Claflin, 52 Fed. R. 657.

[8] Harkness v. Hyde, 98 U. S. 476;

to be changed by amendment to a special appearance,[9] or to be withdrawn.[10]

§ 102. When an appearance must be made.— "The appearance-day of the defendant shall be the rule-day to which the subpœna is made returnable, provided he has been served with process twenty days before that day; otherwise, his appearance-day shall be the next rule-day succeeding the rule-day when the process is returnable."[1] The first Monday of each month is a rule-day.[2] A defendant may appear at any time after the filing of the bill, and before the time named in the rule has expired.[3] The court has power to enlarge the time for an appearance, if special cause therefor be shown.[4]

Mexican C. Ry. Co. v. Pinckney, 149 U. S. 194.

[9] U. S. v. Yates, 6 How. 605; Hohorst v. Hamburg Am. P. Co., 38 Fed. R. 278.

[10] Rhode Island v. Massachusetts, 13 Pet. 23; First Nat. Bank v. Cunningham, 48 Fed. R. 510.

§ 102. [1] Equity Rule 17.

[2] Equity Rule 2.

[3] Heyman v. Uhlman, 34 Fed. R. 686.

[4] Poultney v. La Fayette, 13 Pet. 472.

CHAPTER VII.

TAKING BILLS PRO CONFESSO.

§ 103. When a bill may be taken pro confesso.— If a defendant fails to enter his appearance on or before the day at which the writ is returnable, the bill may be taken as confessed, *pro confesso*, by him.[1] Where the bill when the sub-

§ 103. [1] Equity Rule 12. "By the early practice of the civil law, failure to appear at the day to which the cause was adjourned was deemed a confession of the action, but in later times this rule was changed, so that the plaintiff, notwithstanding the contumacy of the defendant, only obtained judgment in accordance with the truth of the case as established by an *ex parte* examination. Keller, Proceed. Rom., § 69. The original practice of the English Court of Chancery was in accordance with the Roman law. Hawkins v. Crook, 2 P. Wms. 556. But for at least two centuries past bills have been taken *pro confesso* for contumacy. Ibid. Chief Baron Gilbert says: 'Where a man appears by his clerk in court, and after lies in prison, and is brought up three times in court by *habeas corpus*, and has the bill read to him, and refuses to answer, such public refusal in court does not amount to a confession of the whole bill. Secondly, when a person appears and departs without answering, and the whole process of the court has been awarded against him after his appearance and departure, to the sequestration; there also the bill is taken *pro confesso*, because it is presumed to be true when he has appeared and departs in despite of the court, and withstands all its process without answering.' Forum Romanum, 86. Lord Hardwicke likened a decree *pro confesso* to a judgment by *nil dicit* at common law, and to judgment for plaintiff on demurrer to the defendant's plea. Davis v. Davis, 2 Atk. 21. It was said in Hawkins v. Crook, *qua supra*, and quoted in 2 Eq. Cas. Ab. 179, that 'the method in equity of taking a bill *pro confesso* is consonant to the rule and practice of the courts at law, where, if the defendant makes default by *nil dicit*, judgment is immediately given in debt, or in all cases where the thing demanded is certain; but where the matter sued for consists in damages, a judgment interlocutory is given; after which a writ of inquiry goes to ascertain the damages, and then the judgment follows.' The strict analogy of this proceeding in actions of law to a general decree *pro confesso* in equity in favor of the complainant, with a reference to a master to take a necessary account, or to assess unliquidated damages, is obvious and striking. A carefully prepared history of the practice and effect of taking bills *pro confesso* is given in Williams v. Corwin, Hopkins Ch. 471, by Hoffman, Master, in a report made to Chancellor Sanford, of New York." Bradley, J., in Thomson v. Wooster, 114 U. S. 104, 119, 120.

pœna was served did not show jurisdiction against a defendant, a subsequent amendment stating facts sufficient to show jurisdiction against it will not warrant the entry of an order taking the bill as confessed without a second service of the subpœna, or an appearance by such defendant.[3] The same practice should probably be observed when the bill is amended so as to state a new case or to bring in new parties.[3] As to the rule when trivial amendments are added to the bill, the practice in the United States is unsettled.[4] Where an amended bill filed without leave after a default in defendant's appearance was withdrawn without the payment of costs or furnishing a copy to him, it was held that the right to have the original bill taken as confessed had not been waived.[5] If a defendant fails to file a plea, answer, or demurrer, to the bill on or before the rule-day next succeeding that of entering his appearance, the plaintiff may have the bill taken *pro confesso*, unless the defendant has had his time enlarged for cause shown by a judge of the court.[6] A bill may be also taken as confessed upon the failure of a defendant to answer within the time allowed him after a demurrer or plea has been overruled.[7] In a proper case, part of a bill may be taken as confessed.[8] Thus, where the defendant had repeatedly failed to answer an interrogatory, the parts of the bill which the same affected were ordered taken as confessed.[9] So where exceptions to an answer for insufficiency have been sustained, the complainant may, if he chooses, enter an order taking as confessed the parts of the bill to which the exceptions relate.[10] It seems that, in the absence of a rule upon the subject, the complainant in such a case might, at his election, have either the whole

[3] Non-Magnetic Watch Co. v. Asso. H. of Geneva, 45 Fed. R. 210. But see Brown v. Lake Sup. Iron Co., 134 U. S. 530; Nelson v. Eaton, 66 Fed. R. 876.

[3] Nelson v. Eaton, 66 Fed. R. 878; Bank of Utica v. Finch, 1 Barb. Ch. (N. Y.) 75; Weightman v. Powell, 2 De G. & S. 570; Beecher v. Ireland, 46 Kan. 97.

[4] The English rule was that a new subpœna must be served. Weightman v. Powell, 2 De G. & S. 570. See also Blythe v. Hinckley, 84 Fed. R. 228; Harris v. Deitrich, 29 Mich. 366. *Contra*, Bond v. Howell, 11 Paige (N. Y.), 288.

[5] Sheffield Furnace Co. v. Witherow, 149 U. S. 574, 576.

[6] Equity Rule 18.

[7] Suydam v. Beals, 4 McLean, 12.

[8] Ibid.; Hale v. Cont. L. Ins. Co., 20 Fed. R. 844.

[9] Hale v. Cont. L. Ins. Co., 20 Fed. R. 844.

[10] Equity Rule 64; *infra*, § 153.

bill or the parts insufficiently answered taken as confessed.[11] It is uncertain whether, when the defendant after answering the original bill fails to file a further answer to material amendments thereof, the complainant is entitled to have the whole bill taken as confessed, or only the part unanswered.[12] It is doubtful whether a bill can be taken as confessed against an infant or other person under a disability.[13] Certainly, it cannot before a guardian *ad litem* has been appointed.[14] Should the guardian refuse to answer, the safer course for the complainant would be to obtain a reference to a master and prove the allegations of the bill before him.[15]

§ 104. Practice in taking a bill pro confesso.— When a defendant fails to appear or to plead in due time, "the plaintiff may, at his election, enter an order (as of course) in the order-book, that the bill be taken *pro confesso;* and thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill may be decreed by the court at any time after the expiration of thirty days from and after the entry of said order, if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant to compel an answer, and the defendant shall not, when arrested upon such process, be discharged therefrom, unless upon filing his answer, or otherwise complying with such order as the court or judge thereof may direct, as to pleading to or fully answering the bill, within a period to be fixed by the court or judge, and undertaking to speed the cause."[1] No service need be made

[11] Abergavenny v. Abergavenny, 2 Eq. Ca. Abr. 178; Weaver v. Livingston, Hopk. Ch. (N. Y.) 595; Turner v. Turner, 1 Dickens, 316; Smith v. St. Louis Mut. L. Ins. Co., 2 Tenn. Ch. 605. But see Bacon v. Griffith, 2 Dickens, 473; Dennison v. Bassford, 7 Paige (N. Y.), 370.

[12] Suydam v. Beals, 4 McLean, 12, 15. The latter practice seems to be favored in Trust & Fire Ins. Co. v. Jenkins, 8 Paige (N. Y.), 589, 593, 594; Hawkins v. Crook, 2 P. Wms. 559; Davis v. Davis, 2 Atk. 23.

[13] Compare the positive language of Equity Rule 18, with Mills v. Dennis, 3 J. Ch. (N. Y.) 367; O'Hara v. MacConnell, 93 U. S. 151; Massie v. Donaldson, 8 Ohio, 377; Chaffin v. Kimball, 23 Ill. 36, 38.

[14] O'Hara v. MacConnell, 93 U. S. 151.

[15] Mills v. Dennis, 3 J. Ch. (N. Y.) 367.

§ 104. [1] Equity Rule 18. See Read v. Consequa, 4 Wash. 174; O'Hara v. MacConnell, 93 U. S. 150, 152. Doubts have been expressed as to the pro-

of the order taking the bill *pro confesso*.[2] "When the bill is taken *pro confesso* the court may proceed to a decree at any time after the expiration of thirty days from and after the entry of the order to take the bill *pro confesso;* and such decree rendered shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown, upon motion and affidavit of the defendant; and no such motion shall be granted unless upon payment of the costs of the plaintiff in the suit up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause."[3] The application in the Federal courts should be made by motion[4] supported by an affidavit showing the excuse for his default, and also, unless a verified answer accompanies the application, which is the better practice, showing the nature of the defense.[5] If the defense seems to the court to be unconscientious, the application may be denied.[6] In the State courts, applications to open defaults have been denied where the defendants wished to plead a discharge in bankruptcy,[7] and in one case where the complainant's prin-

priety of entering such an order pending a motion upon a special appearance to quash a subpœna or in the case of a cross-bill to dismiss the original bill as against the cross-complainants. Blythe v. Hinckley, 84 Fed. R. 228.

[2] Bank of U. S. v. White, 8 Pet. 262. See Oakley v. O'Neill, 2 N. J. Eq. 287.

[3] Equity Rule 19. See Maynard v. Pomfret, 3 Atk. 468; Heyn v. Heyn, Jacob, 49. Great liberality should be shown to non-residents served by publication. American F. L. M. Co. v. Thomas (C. C. A.), 71 Fed. R. 782. A default caused by an error of a clerk should not prejudice a defendant. Blythe v. Hinckley, 84 Fed. R. 228.

[4] French v. Stewart, 22 Wall. 238.

[5] Schofield v. Horse S. C. Co., 65 Fed. R. 433; Massachusetts B. L. Ass'n v. Lohmiller, 74 Fed. R. 23; Wells v. Cruger, 5 Paige (N. Y.), 164; Winship v. Jewett, 1 Barb. Ch. (N. Y.) 173; Goodhue v. Churchman, 1 Barb. Ch. (N. Y.) 596; Keil v. West, 21 Fla. 508; Emery v. Downing, 13 N. J. Eq. 59. But see Metcalf v. Landers, 3 Baxt. (Tenn.) 35.

[6] Parker v. Grant, 1 J. Ch. (N. Y.) 434; Quincy v. Foot, 1 Barb. Ch. (N. Y.) 496; Freeman v. Warren, 3 Barb. Ch. (N. Y.) 635; Baxter v. Lansing, 7 Paige (N. Y.), 350; National Fire Ins. Co. v. Sackett, 11 Paige (N. Y.), 660. It has been said that in the Federal courts, where there is color of claim that due service was made, a default will not be opened unless a defense on the merits is shown. Massachusetts B. L. Ass'n v. Lohmiller (C. C. A.), 74 Fed. R. 23.

[7] Freeman v. Warren, 3 Barb. Ch. (N. Y.) 635.

cipal witness had died between the default and the motion.[8] Where defendants wished to plead usury, relief has been conditioned upon payment of the principal,[9] and upon a waiver of defense to the claim for the principal and legal interest.[10] An assignee of the subject-matter of the suit, by an assignment made after the default, has no more right to come in and defend than was possessed by the original defendant;[11] but special favor is shown to assignees for the benefit of creditors.[12] It has been held that after the term, a decree taking a bill as confessed cannot be set aside on motion,[13] unless the motion was made or noticed at the term when the decree was entered,[14] even where there is a rule of the State court permitting such a practice.[15] Thus, the entry of a final decree by default upon notice to the defendants, without the entry of a formal order or interlocutory decree taking the bill as confessed, was held to be an irregularity for which the decree would not be set aside upon motion at a subsequent term.[16] But a decree taking a bill as confessed was set aside upon motion at a later term when it had been entered after appearance and before the time to plead had expired.[17] And in a proper case such a decree can be set aside by an original bill.[18] A decree *pro confesso* is not as of course according to the prayer of the bill, nor such as the complainant chooses to take; but it is made by the court according to what is proper to be decreed upon the assumption that the statements in the bill are true.[19] "The matter of the bill ought at least to be opened and explained to the court whenever the decree is applied for, so that the court may see that the decree is a proper one."[20]

[8] Wooster v. Woodhull, 1 J. Ch. (N. Y.) 539.

[9] Bard v. Fort, 3 Barb. Ch. (N. Y.) 632.

[10] Quincy v. Foot, 1 Barb. Ch. (N. Y.) 496; Watt v. Watt, 2 Barb. Ch. (N. Y.) 871; National Fire Ins. Co. v. Sackett, 11 Paige (N. Y.), 660.

[11] Watt v. Watt, 2 Barb. Ch. (N. Y.) 871.

[12] Blanchard v. Cooke, 144 Mass. 207.

[13] Allen v. Wilson, 21 Fed. R. 881; Linder v. Lewis, 1 Fed. R. 878; Stuart v. St. Paul, 63 Fed. R. 644.

[14] Stuart v. St. Paul, 63 Fed. R. 664.

[15] Austin v. Riley, 55 Fed. R. 883.

[16] Linder v. Lewis, 1 Fed. R. 878. See Stuart v. St. Paul, 63 Fed. R. 688.

[17] Fellows v. Hall, 4 McLean, 281.

[18] Thomson v. Wooster, 114 U. S. 104, 112; *infra*, §§ 858, 859.

[19] Bradley, J., in Thomson v. Wooster, 114 U. S. 104, 113; Andrews v. Cole, 20 Fed. R. 410; Rose v. Woodruff, 4 J. Ch. (N. Y.) 547, 548.

[20] Bradley, J., in Thomson v. Wooster, 114 U. S. 104, 113, 114.

It has been said: "The bill, when confessed by the default of the defendant, is taken to be true in all matters alleged with sufficient certainty; but in respect to matters not alleged with due certainty, or subjects which from their nature and the course of the court require an examination of details, the obligation to furnish proofs rests on the complainant."[21] In the State courts a decree *pro confesso* is usually not taken against an infant without proof of the facts.[22] The Federal practice in this respect is not settled. When the bill relates to an unsettled account, a reference to a master is always necessary.[23] The equity rules provide that, after an order taking the bill *pro confesso* for a default in pleading, "thereupon the same shall be proceeded in *ex parte*."[24] Whether this deprives the defendant of the right to notice of subsequent proceedings and to appear before the master is doubtful.[25] By the English practice, the defendant, after a decree *pro confesso* and a reference for an account, was entitled to have notice of the proceedings and to a hearing before the master.[26] Where a bill for the infringement of a patent alleges infringement of "the in-

[21] Master Hoffman in Williams v. Corwin, Hopkins' Ch. 471; quoted by Bradley, J., in Thomson v. Wooster 114 U. S. 104, 110, 111. See Ohio Central R. Co. v. Central Tr. Co., 133 U. S. 83, 91.

[22] Chaffin v. Kimball, 23 Ill. 36, 38; Ingersoll v. Ingersoll, 42 Miss. 155; Massie v. Donaldson, 8 Ohio, 377, 381. *Cf.* O'Hara v. MacConnell, 93 U. S. 151.

[23] Pendleton v. Evans, 4 Wash. 104, 113.

[24] Equity Rule 18. This phrase was not used in the Rules of 1822. 7 Wheat. vii.

[25] Bradley, J., in Thomson v. Wooster, 114 U. S. 104, 119, 120. It has been held in the Second Circuit that "Equity Rule 18 provides that, after the order *pro confesso*, the cause shall proceed *ex parte;* but this does not mean without notice to a party who has appeared in the cause. Such party is entitled to notice, and has the right to be heard as to the form of the decree, and upon such other questions as can be presented upon the complainant's pleadings and proofs. This is the uniform construction given to the rule throughout this circuit." Wallace, J., in Bennett v. Hoefner, 17 Blatchf. 341, 342. The same rule prevails in the Ninth Circuit. Southern Pac. Co. v. Temple, 59 Fed. R. 17. It has been held in the Eighth Circuit that after an order that the bill be taken as confessed, no notice of the motion for a decree need be given to the defendant, although he has entered an appearance, provided that the motion be made in open court. Austin v. Riley, 55 Fed. R. 838.

[26] Heyn v. Heyn, Jacob, 49. So in the New York Chancery. 1 Hoffman Ch. Pr. 520; 1 Barb. Ch. Pr. 479. In New Jersey the rule was discretionary. Brundage v. Goodfellow, 4 Halst. Ch. 513; Thomson v. Wooster, 114 U. S. 104, 119, 120.

vention" of the plaintiffs, and is taken as confessed, it seems that it cannot be claimed in subsequent proceedings in the same suit that the patent is void upon its face.[27] When there are more than one defendant who are charged with a joint liability, after the bill has been taken as confessed against one, no final decree can be made against him, unless and until a decree is entered against those who appear and defend the suit;[28] and if the bill is finally dismissed upon the merits as to them, it will be dismissed as to the defaulter also.[29] But the rule seems to be otherwise where his liability is distinct and several.[30] It seems that a decree taking a bill as confessed is of no effect unless followed by, or included in, a final decree.[31] An appeal can be taken from the final decree after a bill has been taken as confessed. Upon such an appeal the decree may be reversed for a defect in the service of the subpœna;[32] for failure to appoint a guardian *ad litem*, when required;[33] it seems for a want of indispensable parties,[34] and for a failure to set aside the decree upon a proper application.[35] The only question for the consideration of the court is whether the allegations in the bill are sufficient to support the decree.[36] It seems that the objection that the complainant had an adequate remedy at law rests in the discretion of the court of first instance, and that it cannot be waived in the appellate court by a defendant who is in default.[37] Where the defendant had not moved until nine months after the appointment of a receiver, and meanwhile the bill had been taken as confessed, it was held to be too late to take this objection.[38]

[27] Dobson v. Hartford Carpet Co., 114 U. S. 439, 446, 447; Reedy v. Western El. Co. (C. C. A.), 83 Fed. R. 709.

[28] Frow v. De La Vega, 15 Wall. 552.

[29] Terry v. Fontaine's Adm'r, 83 Va. 451; Petty v. Hannum, 2 Humph. (Tenn.) 102; Butler v. Kenzie, 41 Tenn. Ch. 110; s. c., 15 S. W. R. 1068; Clason v. Morris, 10 Johns. (N. Y.) 524; Kooper v. Dyer, 59 Vt. 477.

[30] Andrews v. Lee, 1 Dev. & B. Eq. (N. C.) 318; Simpson v. Moore, 5 Lea (Tenn.), 376.

[31] Frow v. De La Vega, 15 Wall. 552; Butterworth v. Hill, 114 U. S. 128.

[32] O'Hara v. MacConnell, 93 U. S. 150; Butterworth v. Hill, 114 U. S. 128.

[33] O'Hara v. MacConnell, 93 U. S. 150.

[34] Ibid.

[35] American F. L. M. Co. v. Thomas (C. C. A.), 71 Fed. R. 782; Nelson v. Eaton (C. C. A.), 66 Fed. R. 376.

[36] Masterson v. Howard, 18 Wall. 99; Ohio C. R. Co. v. Central Tr. Co., 133 U. S. 83.

[37] Brown v. Lake Superior Iron Co., 134 U. S. 530; Western Elec. Co. v. Reedy, 66 Fed. R. 163.

[38] Brown v. Lake Superior Iron Co., 134 U. S. 530.

CHAPTER VIII.

DEMURRERS.

§ 105. Definition and general characteristics of a demurrer.— A demurrer is a pleading which admits the truth of a bill, but claims that the defendant should be excused from answering thereto and the complainant be denied relief on account of some irregularity or insufficiency existing in it. As the name denotes, demurrers were borrowed from the common law.[1] They are so termed because the defendant *demoratur*, or will go no farther.[2] A speaking demurrer is one that introduces a new fact or averment which is necessary to support the demurrer, and does not appear distinctly on the face of the bill.[3] Such a demurrer is always bad, and will be overruled.[4] But in order to constitute a speaking demurrer, the fact or averment introduced must be one which is necessary to support the demurrer and is not found in the bill; the introduction of immaterial facts, or averments, or of arguments, is improper, but constitutes mere surplusage and will not vitiate the demurrer.[5] A demurrer is also bad if it relies for its support upon averments in an answer.[6] A demurrer must not be addressed to a point within the discretion of the court; if so, it will be overruled.[7] It has been held that when the bill shows that a defendant is not an inhabitant of the district that defect may be raised by demurrer.[8] A demurrer cannot reg-

§ 105. [1] Langdell's Eq. Pl., §§ 53, 92.

[2] Daniell's Ch. Pr. (5th Am. ed.) 543; 3 Bl. Com. 314.

[3] Edsell v. Buchanan, 4 Brown Ch. C. 254; Davies v. Williams, 1 Simons, 5, 7; Lamb v. Starr, Deady, 350; Daniell's Ch. Pr. (2d Am. ed.) 656, note 2; Story's Eq. Pl., § 448.

[4] Esdell v. Buchanan, 4 Brown Ch. C. 254; Story's Eq. Pl., § 448; Daniell's Ch. Pr. (2d Am. ed.) 656, note 2.

[5] Daniell's Ch. Pr. (2d Am. ed.) 657; Cawthorn v. Chalie, 2 Sim. & S. 127; Davies v. Williams, 1 Simons, 5.

[6] Chicago, St. L. & N. O. R. Co. v. Macomb, 2 Fed. R. 18.

[7] Verplank v. Caines, 1 J. Ch. (N. Y.) 57.

[8] Reinstadler v. Rehls, 33 Fed. R. 308; Miller-Magee Co. v. Carpenter, 34 Fed. R. 433. But see § 101; Robinson v. National Stock-yard Co., 12 Fed. R. 361; Edwards v. Drake, 15 Fla. 666; and *supra*, § 101.

ularly be filed to an answer,[9] nor to a plea.[10] The propriety of issuing the writ of *ne exeat* cannot be questioned by a demurrer.[11]

§ 106. Admissions by a demurrer.— A demurrer admits the truth of the allegations of fact in the bill.[1] "As a matter of construction of an ambiguous clause, the court is bound to adopt that interpretation which is least favorable to the plaintiff; but the defendant is not entitled to press this principle so far as to draw any inferences of fact he pleases which may happen to be not inconsistent with the averments of the bill."[2] It has been said that "reasonable presumptions are admitted by demurrer as well as the matters expressly alleged."[3] The court will not infer from an allegation that a fraud was committed at a time beyond the limit of the Statute of Limitations, that the fraud was then discovered.[4] "A demurrer only admits facts well pleaded; it does not admit matters of inference and argument, however clearly stated; it does not admit, for example, the accuracy of an alleged construction of an instrument, when the instrument itself is set forth in the bill, or a copy is annexed, against a construction required by its terms, nor the correctness of the ascription of a purpose to the parties when not justified by the language used. The several averments of the plaintiff in the bill as to his understanding of his rights, and of the liabilities and duties of others under the contract, can, therefore, exert no influence upon the mind of the court in the disposition of the demurrer."[5] "Though the authorities are by no means unanimous, the weight of opinion

[9] Crouch v. Kerr, 88 Fed. R. 549; Grether v. Wright (C. C. A.), 75 Fed. R. 742; *infra*, §§ 147, 153.

[10] Zimmerman v. So Relle, 80 Fed. R. 417. See MacVeagh v. Denver C. W. Co., 85 Fed. R. 74; Griswold v. Bacheller, 77 Fed. R. 857; *infra*, § 140.

[11] Shainwald v. Lewis, 69 Fed. R. 487; *infra*, § 268.

§ 106. [1] Bailey v. Birkenhead, L. & C. J. Ry. Co., 12 Beav. 433, 443; Pac. R. Co. of Mo. v. Mo. Pac. Ry. Co., 111 U. S. 505, 522; Boyer v. Boyer, 113 U. S. 689, 701.

[2] Sir Page Wood, V. C., in Simpson v. Fogo, 1 J. & H. 18, 23; s. c., 6 Jurist (N. S.), 949. See Union Pac. Ry. Co. v. Mercer, 28 Fed. R. 9.

[3] Clifford, J., in Amory v. Lawrence, 3 Clifford, 523, 526.

[4] Sheldon v. Keokuk N. L. P. Co., 8 Fed. R. 769, 777; Johnson v. Powers, 13 Fed. R. 315; Jones v. Slawson, 33 Fed. R. 632, 636.

[5] Field, J., in Dillon v. Barnard, 21 Wall. 430, 437, 438. See also s. c., 1 Holmes, 386; U. S. v. Ames, 99 U. S. 35, 45; Cornell v. Green, 43 Fed. R. 105, 107; Interstate L. Co. v. Maxwell L. Co., 139 U. S. 569. Where deeds and other written instruments were set out in a pleading, from which

is in favor of the proposition that where *profert* is made of a recorded paper it is for all purposes presented to the court as a part of the pleading, and an objection thereto may be taken by demurrer."[6] A demurrer does not admit conclusions of law; and in the construction of the bill upon the argument they may be disregarded.[7] Such, for example, are the allegations that a tax is "unreasonable and excessive," without the statement of any valid reasons for so considering it;[8] that a fee charged by an ordinance styling it wharfage "is not real wharfage, but a duty on tonnage."[9] "The words 'fraud' and 'conspiracy' alone, no matter how often repeated in a pleading, cannot make a case for the interference of a court of equity. Until connected with some specific acts for which one person is in law responsible to another they have no more effect than other words of unpleasant signification."[10] The words "fraudulently," "deceitfully," and "by mistake" are conclusions of law, and will be disregarded.[11] Averments that what was done

a certain inference as to their legal effect might plausibly be drawn, but it was alleged as a fact that a reason existed for their execution which would justify a different inference as to their legal effect, it was said that it could not be held on demurrer that the former inference should, and the latter should not, be drawn, but proof must be adduced to show the actual facts which determine the proper effect of the instruments. Smith v. Glasgow Ins. Co. (C. C. A.), 74 Fed. R. 382.

[6] Coxe, J., in Bogart v. Hinds, 25 Fed. R. 484, citing Knott v. Burleson, 2 G. Greene (Iowa), 600; Wilder v. McCormick, 2 Blatchf. 31, 35; Grahame v. Cooke, 1 Cranch, C. C. 116; Douglass v. Rathbone, 5 Hill (N. Y.), 143; Rantin v. Robertson, 2 Strobh. Law (S. C.), 366; 1 Chitty's Pl. 415, 416. So held of patents and reissued patents by Coxe, J., in International T. C. L. Co. v. Maurer, 44 Fed. R. 618, 619; Enterprise Mfg. Co. v. Snow, 67 Fed. R. 235; U. S. Credit S. Co. v. Am. Credit Co., 53 Fed. R. 818; Germain v. Wilgus, 67 Fed. R. 597; Heaton P. B. F. Co. v. Schlochtermeyer, 69 Fed. R. 592. But see Indurated F. Ind. Co. v. Grace, 52 Fed. R. 124, 128; *supra*, §§ 77, 78. In Ulman v. Jaeger, 67 Fed. R. 980, 982, held, that exhibits filed with a bill are upon a demurrer to be read as part of the bill. *Contra*, held under Code practice in Penrose v. Pac. Mut. L. I. Co., 66 Fed. R. 253. See Kesher v. Lyon, 40 W. Va. 161, 20 S. E. R. 933.

[7] Dillon v. Barnard, 21 Wall. 430; Wilson v. Gaines, 103 U. S. 417; Packet Co. v. Catlettsburg, 105 U. S. 559; Transportation Co. v. Parkersburg, 107 U. S. 691; Louisville & N. R. Co. v. Palmes, 109 U. S. 244.

[8] Packet Co. v. Catlettsburg, 105 U. S. 559.

[9] Transportation Co. v. Parkersburg, 107 U. S. 691.

[10] Waite, C. J., in Ambler v. Choteau, 107 U. S. 586, 591. For allegations held sufficient, see Pac. R. of Mo. v. Mo. Pac. Ry. Co., 111 U. S. 505.

[11] Magniac v. Thompson, 2 Wall. Jr. 209; *supra*, §§ 67, 69.

was "colorable," "a fraud," "a breach of trust," and "a scheme by which Blair and Taylor were to get" certain stock or shares of stock in a corporation "without paying for them," are allegations of conclusions of law, which a demurrer does not admit.[12] An averment that a thing was done with the intent to defraud is an allegation of fact.[13] An allegation as to the future effect of an act threatened by the defendant was held to be admitted by a demurrer.[14] A demurrer does not admit a false allegation concerning a fact of which the court will take judicial notice.[15] Thus, a demurrer does not admit the allegation that a town is in a certain county, when in fact it is in another county of which the court can take judicial notice.[16] Upon a demurrer to an infringement bill the court may take judicial notice of facts within the common knowledge of persons ordinarily well informed; and it may refresh its recollection upon the subject by a reference to books published before the application, which show that the patent is void for lack of novelty, utility or patentability.[17] But it will not apply any special knowledge which the judge may possess,[18] nor investigate the prior state of the art,[19] nor even, it has been said, examine other patents mentioned in the bill,[20] nor recitals as to the prior state of the art in the specifications of the letters-patent of which profert is made;[21] and in such case every doubt is resolved against the demurrer.[22] A demurrer is deemed to be an admission of the allegations of the bill upon a motion on the bill and demurrer.[23]

[12] Fogg v. Blair, 139 U. S. 118, 127.

[13] Platt v. Mead, 9 Fed. R. 91.

[14] St. Louis v. Knapp Co., 104 U. S. 658. In Hutton v. Joseph Bancroft & Sons, 83 Fed. R. 17, it was held that a bare allegation that certain matters "will be" done was insufficient.

[15] Taylor v. Barclay, 2 Simons, 213. Compare Louisville & N. R. Co. v. Palmes, 109 U. S. 244, 252.

[16] Ross v. Fort Wayne, 63 Fed. R. 466.

[17] Am. Fibre Ch. Co. v. Williamson, 69 Fed. R. 247; Am. Fibre Ch. Co. v. Buckskin F. Co. (C. C. A.), 72 Fed. R. 508. See an essay by Mr. Samuel H. Fisher in 5 Yale Law J. 213.

[18] Cleveland F. Co. v. Vulcan B. Co., 72 Fed. R. 505.

[19] Rowe v. Blodgett & C. Co., 87 Fed. R. 868.

[20] Cleveland F. Co. v. Vulcan B. Co., 72 Fed. R. 505.

[21] Indurated F. I. Co. v. Grace, 52 Fed. R. 124.

[22] Drainage Constr. Co. v. Englewood, 67 Fed. R. 141.

[23] Bayerque v. Cohen, McAllister, 113. As to the effect of the admission in another suit, see Kankakee, L. & M. R. Co. v. Horan, 131 Ill. 288.

§ 107. Demurrers to parts of bills.— A demurrer may be to the whole, or to a part of a bill,[1] or to both the whole and separate parts of a bill.[2] Separate demurrers may be filed for different causes to separate parts of a bill.[3] If only a part of the bill be demurred to, the demurrer must be accompanied by a plea or answer to what remains.[4] The defendant may demur to part, plead to part, and answer as to the residue.[5] Such a mode of pleading is now, however, very rare; for the same defenses can usually be embraced with more convenience and safety in an answer.[6] "If a demurrer is too general, that is, if it covers, or is applied to the whole bill, when it is good to a part only; or if it is a demurrer to a part of a bill only, but yet is not good to the full extent which it covers, but is so to a part only, it will be overruled; for it is a general rule that a demurrer (it is otherwise as to a plea) cannot be good as to a part which it covers, and bad as to the rest, and therefore it must stand or fall altogether."[7] The court may, however, allow the defendant to amend his demurrer upon narrowing its terms.[8] It has been held at Circuit that an objection to an immaterial allegation in a bill should be taken by exception and not by demurrer.[9] The equity rules, changing the former practice, now provide that "no demurrer or plea shall be overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to."[10] Formerly, when a defendant filed a plea or answer to

§ 107. [1] Equity Rule 82.

[2] Int. T. C. Lumber Co. v. Marner, 44 Fed. R. 621.

[3] North v. Earl of Strafford, 3 P. Wms. 148; Roberdeau v. Rous, 1 Atk. 544; Daniell's Ch. Pr. (5th Am. ed.), 584.

[4] See Story's Eq. Pl., § 442; Daniell's Ch. Pr. (5th Am. ed.) 583.

[5] Equity Rule 83.

[6] Equity Rule 39.

[7] Story's Eq. Pl., § 443; Metcalf v. Hervey, 1 Ves. Sen. 248; Verplank v. Caines, 1 J. Ch. (N. Y.) 57; Higinbotham v. Burnet, 5 J. Ch. (N. Y.) 184; Atwill v. Ferrett, 2 Blatchf. 39; Brandon Mfg. Co. v. Prime, 14 Blatchf. 371; s. c., 6 Bann. & A. 191; Heath v. Erie Ry. Co., 8 Blatchf. 347; Eq. Life Ass. Soc. v. Patterson, 1 Fed. R. 126.

[8] Baker v. Mellish, 11 Ves. 70; Gregg v. Legh, 4 Madd. 192, 207; Atwill v. Ferrett, 2 Blatchf. 39, 49; N. P. R. Co. v. Roberts, 42 Fed. R. 734.

[9] Stonemetz P. M. Co. v. Brown F. M. Co., 46 Fed. R. 72; Stirrat v. Excelsior Mfg. Co., 44 Fed. R. 142; *supra*, § 68.

[10] Equity Rule 36, which follows the 36th Order in Chancery of August, 1841. See, however, Dell v. Hale, 2 Y. & C. N. R. 1; Atwill v. Ferrett, 2 Blatchf. 39; Heath v. Erie Ry. Co., 8 Blatchf. 347; Brandon Mfg. Co. v. Prime, 14 Blatchf. 371; s. c., 8

the same part of a bill as that to which he demurred, it was held that he thereby waived his demurrer, which was then overruled by the court.[11] But a demurrer by one defendant was not overruled by a plea or answer filed by another.[12] Now, however, the rules declare that "no demurrer or plea shall be held bad, and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by the demurrer or plea."[13] It has been held, under this rule, that a demurrer to the whole bill is not overruled by a plea or answer;[14] but the defendant may be compelled upon motion to elect between such a demurrer and the answer or plea;[15] and if he elect to stand by his demurrer, it seems that he will thereby waive his right to answer should his demurrer be overruled.[16] By proceeding to an argument of the demurrer, an objection of this nature will be waived.[17] The English courts have held, that a defendant cannot answer to the relief of a bill and demur to the discovery, unless he can rest his demurrer upon one of the recognized grounds on account of which a witness is always excused from answering.[18] A demurrer which is good as to the relief will also bar the discovery; although if the bill be good for discovery but not for relief, the defendant does not prejudice a demurrer filed by him to the relief by answering as to the discovery.[19] A demurrer which is good as to the discovery need not be good as to the relief.[20]

Bann. & A. 191; Eq. L. A. Soc. v. Patterson, 1 Fed. R. 126.

[11] Story's Eq. Pl., § 443; Dawson v. Sadler, 1 Sim. & S. 537, 542; Langdell's Eq. Pl., § 103.

[12] Dakin v. Union Pac. Ry. Co., 5 Fed. R. 665.

[13] Equity Rule 37.

[14] Hayes v. Dayton, 8 Fed. R. 702, 706. But see Crescent City L. S. Co. v. Butchers' U. L. S. Co., 12 Fed. R. 225; Adams v. Howard, 21 Off. Gaz. 264; s. c., 9 Fed. R. 347; Huntington v. Laidley, 79 Fed. R. 865; *infra*, § 140, note 17.

[15] Adams v. Howard, 21 Off. Gaz. 264; s. c., 9 Fed. R. 347. See U. S. v. Am. Bell Tel. Co., 30 Fed. R. 523.

[16] Adams v. Howard, 21 Off. Gaz. 264; s. c., 9 Fed. R. 347; Orendorf v. Budlong, 12 Fed. R. 24.

[17] Hayes v. Dayton, 8 Fed. R. 702, 706.

[18] Dell v. Hale, 2 Y. & C. N. R. 1; Brownsword v. Edwards, 2 Ves. Sen. 243; Daniell's Ch. Pr. (2d Am. ed.) 605–607.

[19] Daniell's Ch. Pr. (2d Am. ed.) 604, 605; Langdell's Eq. Pl., § 103; Story's Eq. Pl., § 312; Rules 36, 37; Jeffreys v. Baldwin, Amb. 164; Hodgkin v. Longden, 8 Ves. 2; Todd v. Gee, 17 Ves. 273; French v. Hay, 22 Wall. 250.

[20] Atwill v. Ferrett, 2 Blatchf. 39, 43; Heath v. Erie Ry. Co., 8 Blatchf. 348; Farmer v. Calvert Lith. Co., 1 Flippin, 228.

§ 108. Classification of demurrers to the relief.— Demurrers to the relief claim that for some reason apparent upon the face of the bill the plaintiff is not entitled to the relief prayed for in it. They are classified by Mitford, afterwards Lord Redesdale, substantially as follows:[1] Demurrers to the relief are founded on objections to the jurisdiction; to the person; or to the matter of the bill, either in substance or in form. Demurrers to the jurisdiction are allowed either (1) because the subject of the suit is not within the jurisdiction of a court of equity; or (2) because some other court of equity has the proper jurisdiction. A demurrer of this last class is much more frequent now than formerly. For the rule, that in a superior court of general jurisdiction the presumption is that nothing shall be intended out of its jurisdiction that is not shown or intended to be so,[2] does not apply to the courts of the United States, whose jurisdiction is confined to what is expressly given them by the Constitution and statutes; and must always appear upon the record.[3] It has been held that the objection that one of two plaintiffs suing to enforce a common, not a joint right, is a citizen of the same State as a defendant, cannot be raised by a demurrer to the whole bill.[4] Causes of demurrer to the person are: that it appears upon the face of the bill that the plaintiff has not the legal capacity to sue, either at all, as an alien enemy, or an unincorporated association suing as a corporation; or alone, as an infant, idiot, lunatic, and in some States a married woman.[5] Demurrers to the substance of a bill are that it appears upon the face of the bill: (1) That the plaintiff has no interest in the subject-matter of the bill. It has been held that the objection that one of two plaintiffs has no interest in the subject-matter can be raised by a general demurrer for want of equity.[6] (2) That the defendant is not

§ 108. [1] Mitford's Pl., ch. 11, § 2.

[2] Daniell's Ch. Pr. (2d Am. ed.) 615; Earl of Derby v. Duke of Athol, 1 Ves. Sen. 203.

[3] Turner v. Bank of N. A., 4 Dall. 8; Godfrey v. Terry, 97 U. S. 171.

[4] Nebraska City Nat. Bank v. Nebraska City H. G. L. Co., 14 Fed. R. 763. But see Hodge v. North Mo. R. Co., 1 Dill. 104.

[5] *Supra*, §§ 31–33. A bill filed by a next friend was held demurrable when it did not show that the plaintiff was disabled to sue alone. West v. Reynolds, 35 Fla. 317, 17 S. R. 740. See also Wheeler & Wilson Mfg. Co. v. Filer, 52 N. J. Eq. 164; Paige v. Broadfoot, 100 Ala. 610.

[6] Hodge v. North Mo. R. Co., 1 Dill. 104. But see Nebraska C. Nat. Bank v. Nebraska C. H. G. L. Co., 14 Fed. R. 763.

answerable to him, but to some other person. (3) That the defendant has no interest in the subject-matter of the suit. (4) That the plaintiff is not entitled to the relief he prays; but if the bill show a case for some relief, and yet ask for too much or the wrong relief, it is not demurrable, provided it contain the prayer for general relief.[7] (5) That the value of the subject-matter is beneath the dignity of the court. In England the Court of Chancery declined to interfere when the value of the matter in dispute was less than ten pounds, except in suits brought by or on behalf of charities, and under bills to obtain relief on account of fraud, or to establish a right.[8] In the Circuit Courts of the United States the bill should show affirmatively that the matter in dispute, exclusive of interest and costs, exceeds two thousand dollars,[9] except in certain cases for which the statutes specially provide.[10] (6) That the bill does not embrace the whole matter concerning which the suit is brought, and which is capable of being immediately disposed of, so that there is danger of the defendant's being harassed with other suits about the same.[11] (7) That there is a want of proper parties, plaintiff or defendant.[12] (8) That there is a misjoinder[13] of parties plaintiff. A superfluity of defendants, not accompanied by multifariousness, is the subject of objection by those only who were improperly joined.[14] (9) That the plaintiff's remedy is barred by length of time or laches.[15] When

[7] Patrick v. Isenhart, 29 Fed. R. 889; Whitbeck v. Edgar, 2 Barb. Ch. (N. Y.) 106.

[8] Daniell's Ch. Pr. (2d Am. ed.) 378, 379; Brace v. Taylor, 2 Atk. 253; Moore v. Lyttle, 4 J. Ch. (N. Y.) 183.

[9] U. S. v. Pratt C. & C. Co., 18 Fed. R. 708; 24 St. at L., ch. 373. But see Sharon v. Terry, 36 Fed. R. 337.

[10] See §§ 15, 16.

[11] Anon., 2 Ch. Cas. 164; Purefoy v. Purefoy, 1 Vern. 29; Shuttleworth v. Laycock, 1 Vern. 245; Margrave v. Le Hooke, 2 Vern. 207.

[12] Dwight v. Central Vt. R. Co., 9 Fed. R. 785.

[13] Walker v. Powers, 104 U. S. 245; Lansdale v. Smith, 106 U. S. 391; Taylor v. Holmes, 14 Fed. R. 498; Markey v. Mutual Ben. L. I. Co., 6 Ins. L. J. 537; Wollensak v. Reiher, 115 U. S. 96.

[14] Cherrey v. Monro, 2 Barb. Ch. (N. Y.) 618; Toulmin v. Hamilton, 7 Ala. 362. But see Bank v. Carrollton R. Co., 11 Wall. 624.

[15] Maxwell v. Kennedy, 8 How. 210; Badger v. Badger, 2 Wall. 87, 94; Marsh v. Whitmore, 21 Wall. 185; Sullivan v. P. & K. R. Co., 94 U. S. 806; Brown v. Buena Vista, 95 U. S. 161; Godden v. Kimmell, 99 U. S. 201; National Bank v. Carpenter, 101 U. S. 567. For a definition of equitable laches see De Gendre v. Byrnes, 44 N. J. Eq. 372. But see Beekman v. Hudson R. W. S. Ry. Co., 35 Fed. R. 3.

a bill praying an injunction to restrain the infringement of a reissued patent sets out or exhibits both the original and the reissued patent, and it appears from inspection that the sole object of the reissue was to enlarge and expand the claims of the original, and that a delay of two or three years has taken place in applying for the reissue, not explained by special circumstances giving sufficient ground for the delay; the question of laches is a question of law arising on the face of the bill, which avails as a defense, upon a general demurrer for want of equity.[16] If it appears by the face of the bill that the case of the complainant is barred by the statute of limitations, it is demurrable.[17] The facts which show that the delay is excusable must be set up in the bill.[18] A demurrer will also be sustained where the bill shows that the plaintiff's case is repugnant to the statute of frauds.[19] (10) That the bill is multifarious.[20] It has been held that only such defendants as would suffer by the multifariousness can raise this objection.[21] Or (11) that there is another suit pending between the parties for the same cause of action. Demurrers for insufficiency as to form are either: (1) That the plaintiff's place of abode is not stated; or that a compliance has not been made with any of the other requirements of Rule 20.[22] (2) That the facts essential to the plaintiff's right and within his own knowledge are not alleged positively.[23] (3) That the bill is deficient in certainty.[24] (4) That the plaintiff does not in his bill offer to do equity, when it is the custom of the

[16] Wollensak v. Reiher, 115 U. S. 96, 101.

[17] Godden v. Kimmell, 99 U. S. 201; National Bank v. Carpenter, 101 U. S. 567; Wisner v. Barnet, 4 Wash. 631. But see Sullivan v. P. & K. R. Co., 94 U. S. 806, 811; Doe v. Hyde, 114 U. S. 247; Philippi v. Philippe, 115 U. S. 151. A defendant to a foreclosure suit, who claimed an interest in the property, but who was not alleged to be in possession nor alleged to owe the amount of the debt, was not allowed by a demurrer to avail himself of the statute of limitations. Blair v. Silver Peak Mines, 84 Fed. R. 787.

[18] Edison El. L. Co. v. Equitable Life Assur. Soc. of U. S., 55 Fed. R. 478; *supra*, § 69. But see Brush El. Co. v. Ball El. L. Co., 43 Fed. R. 899.

[19] Randall v. Howard, 2 Black, 585, 589. But see Chapman v. School Dist., 1 Deady, 108.

[20] See §§ 71-75.

[21] Atwill v. Ferrett, 2 Blatchf. 39, 44; Buerk v. Imhaeuser, 8 Fed. R. 457; Hill v. Bonaffon, 2 W. N. C. (Pa.) 356; *supra*, §§ 71-75.

[22] Mitford's Pl., ch. 2, § 2; Rowley v. Eccles, 1 Sim. & S. 511.

[23] Mitford's Pl., ch. 2, § 2; Daniell's Ch. Pr. 412, 625.

[24] Taylor v. Holmes, 14 Fed. R. 498; Goldsmith v. Gilliland, 22 Fed. R. 865.

court to require him to do so.[25] (5) That the bill is not signed by counsel.[26] (6) That the bill is not supported by an affidavit when one is necessary.[27] A demurrer to the relief will not lie upon the ground that the bill contains irrelevant matter. The proper remedy for this is an exception for impertinence.[28] Neither is a bill demurrable because indispensable parties, whom it names and against whom it prays process, have not been served with subpœnas to appear and answer.[29] If any part of the relief prayed is proper the demurrer will be overruled.[30]

§ 109. Demurrers to the discovery.—A demurrer to the discovery claims that, for some reason apparent upon the face of the bill, the defendant should not be obliged to answer so much thereof as his demurrer covers. Professor Langdell says: "A demurrer to discovery indeed is not in its nature a demurrer at all, but a mere statement in writing that the defendant refuses to answer certain allegations in the bill, for reasons which appear upon the face of the bill, and which the demurrer points out."[1] A defendant may thus demur because (1) his answer may subject him to a pain, penalty, or forfeiture;[2] (2) that it is immaterial to the purposes of the suit;[3] (3) that it would involve a breach of some confidence which it is the policy of the law to preserve inviolate,[4] as a professional confidence,[5] or one obtained in the course of a public office;[6] (4) that the matters of which a discovery is sought pertain ex-

[25] U. S. v. Pratt C. & C. Co., 18 Fed. R. 708. See § 82.

[26] Rule 24; Dwight v. Humphreys, 3 M'Lean, 104.

[27] Findlay v. Hinde, 1 Pet. 241, 244.

[28] Pac. R. Co. of Mo. v. Mo. Pac. Ry. Co., 111 U. S. 505, 522; Rule 26; *supra*, § 68.

[29] Kilgour v. N. O. G. Light Co., 2 Woods, 145.

[30] Chicago, M. & St. P. Ry. Co. v. Hartshorn, 30 Fed. R. 541; Strawberry Hill v. Chicago, M. & St. P. Ry. Co., 41 Fed. R. 568.

§ 109. [1] Langdell's Eq. Pl., § 97.

[2] Stewart v. Drasha, 4 M'Lean, 563; Atwill v. Ferrett, 2 Blatchf. 39; U. S. v. White, 17 Fed. R. 561, 565; Snow v. Mast, 63 Fed. R. 623; Paxton v. Douglas, 19 Ves. 225; Story's Eq. Pl., §§ 575–599. Perhaps, also, if it might disgrace him. Franco v. Bolton, 3 Ves. 368; Finch v. Finch, 2 Ves. Jr. 491, 493; Brownsword v. Edwards, 2 Ves. Jr. 243, 245; Northrop v. Hatch, 6 Conn. 361, 363.

[3] Harvey v. Morris, Rep. temp. Finch, 214; Daniell's Ch. Pr. (2d Am. ed.) 636, 637. But see Pac. R. of Mo. v. Mo. Pac. Ry. Co., 111 U. S. 505, 522.

[4] Story's Eq. Pl., § 547; Gormully & Jeffery Mfg. Co. v. Bretz, 64 Fed. R. 612.

[5] Greenough v. Gaskell, 1 Myl. & K. 100; Story's Eq. Pl., § 547, and cases cited.

[6] Smith v. East India Co., 1 Phillips, 50; Atty.-Gen. v. London, 12 Beav. 8; Worthington v. Scribner, 109 Mass. 487, 493.

clusively to the defendant's case;[7] (5) according to the old rule, because the defendant has, "in conscience, a right equal to that claimed by a person filing a bill against him, though not clothed with a perfect legal title,"[8] as, if he be a purchaser in good faith, and for a valuable consideration, without any notice of the plaintiff's claim.[9] Where the complainant is the only person who can insist upon the penalty or forfeiture, and he waives it in his bill, he may compel a discovery.[10] In certain cases, a defendant may be obliged to answer to a charge of a fraud which might subject him to a criminal prosecution.[11] An English case holds that a discovery can be compelled although a defendant might thereby admit his guilt of an offense against the criminal laws of a foreign country.[12] Demurrers to the discovery are now rarely filed. For the objections to the discovery do not usually appear upon the face of a bill; and when they do, it seems that, since the equity rules, they can now in all cases be taken by answer.[13] A demurrer to an interrogatory that has been already answered cannot raise the question whether the answer to it is sufficient.[14] The subject of discovery is of much less importance now than formerly; and the curious reader is therefore referred to the works of Wigram and Hare for a full discussion of it.[15]

§ 110. Of what defects advantage should be taken by demurrer.— Advantage can be taken of most defects in a bill by answer, as well as by demurrer. But objections to defects in the form of a bill, except possibly those which are required by the equity rules,[1] can only be raised by demurrer.[2] Such are an omis-

[7] Bolton v. Liverpool, 1 Myl. & K. 88; Daniell's Ch. Pr. (2d Am. ed.) 645-648.

[8] Daniell's Ch. Pr. (2d Am. ed.) 635, 636.

[9] Jerrard v. Saunders, 2 Ves. Jr. 454; Glegg v. Legh, 4 Madd. 193; Langdell's Eq. Pl., § 188.

[10] Mason v. Lake, 2 Brown, P. C. 495; Lord Uxbridge v. Staveland, 1 Ves. Sen. 56; Atwill v. Ferrett, 3 Blatchf. 39.

[11] Dummer v. Chippenham, 14 Ves. 245, 251; Story's Eq. Pl., § 578; Daniell's Ch. Pr. (2d Am. ed.) 631, 632.

[12] King of Two Sicilies v. Wilcox, 1 Simons (N. S.), 301. See also U. S. v. McRae, L. R. 4 Eq. 327; s. c., L. R. 3 Ch. App. 79.

[13] See Rules 39, 44.

[14] Chicago, St. L. & N. O. R. Co. v. Macomb, 2 Fed. R. 18.

[15] See *infra*, §§ 148, 281.

§ 110. [1] See National Bank v. Insurance Co., 104 U. S. 54, 76.

[2] Daniell's Ch. Pr. (2d Am. ed.) 453; Story's Eq. Pl., §§ 453, 528: Hook v. Dorman, 1 Sim. & S. 227; Crosse v. Bedingfield, 12 Sim. 35; Findlay v. Hinde, 1 Pet. 244; Fischer v. O'Shaughnessey, 6 Fed. R. 92.

sion to allege that two defendants infringed a patent jointly,[3] and a lack of certainty in the bill,[4] especially as regards allegations of fraud.[5] If the want of equity of the plaintiff's case be clearly apparent upon the face of the bill, an omission to demur may be a ground for refusing the defendant costs at the hearing.[6] The objection that the plaintiff has an adequate remedy at law should be specifically raised in a demurrer, plea, or answer,[7] although the court may for its own protection dismiss a bill for this at any stage of the proceedings.[8]

§ 111. When a demurrer should be filed.—"It shall be the duty of the defendant, unless his time shall be otherwise enlarged, for cause shown by a judge of the court upon motion for that purpose, to file his plea, demurrer, or answer to the bill in the clerk's office on the rule-day next succeeding that of entering his appearance. In default thereof, the plaintiff may at his election enter an order (as of course) in the order-book that the bill be taken *pro confesso;* and thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill may be decreed by the court at any time after the expiration of thirty days from and after the entry of said order, if the same can be done without an answer and is proper to be decreed."[1] The demurrer may be filed, even after the rule-day, at any time before an order has been entered directing that the bill be taken *pro confesso*,[2] or after such an order by leave of the court.[3]

§ 112. Title of demurrer.—A demurrer is usually entitled substantially thus: "The demurrer of John Stiles to the bill of complaint of Richard Roe."[1] If accompanied by a plea or answer, or both, it should be called in the title "the demurrer and plea," or "the demurrer and answer," or "the demurrer,

[3] Fischer v. O'Shaughnessey, 6 Fed. R. 92; Putnam v. Hollander, 6 Fed. R. 882.

[4] Chicago, M. & St. P. R. Co. v. Pullman P. C. Co., 50 Fed. R. 24; Green v. Terwilliger, 56 Fed. R. 384; Thomas v. Nantahala M. & T. Co. (C. C. A.), 58 Fed. R. 485.

[5] Rorback v. Dorsheimer, 25 N. J. Eq. 516, 518; Mason v. Daly, 117 Mass. 403; *supra*, § 69.

[6] Harland v. Bankers' & M. Tel. Co., 32 Fed. R. 305.

[7] Reynes v. Dumont, 130 U. S. 354; Kilburn v. Sunderland, 130 U. S. 505; Brown v. Lake Sup. I. Co., 134 U. S. 530.

[8] Lewis v. Cocks, 23 Wall. 466; Oelrichs v. Spain, 15 Wall. 211; Reynes v. Dumont, 130 U. S. 354, 395.

§ 111. [1] Equity Rule 18.

[2] Equity Rule 32; Oliver v. Decatur, 4 Cranch, C. C. 458.

[3] Equity Rule 32; Harvey v. Richmond O. & M. Ry. Co., 64 Fed. R. 19.

§ 112. [1] Daniell's Ch. Pr. (2d Am. ed.) 652.

plea, and answer."[2] When it is to an amended bill, it need not be expressed in the title to be a demurrer to both the original and the amended bill; but if designated as a demurrer to the amended bill, that will be sufficient.[3]

§ 113. Protestation.— After the title formerly followed the clause, "This defendant, by protestation, not confessing all or any of the matters and things in the said complainant's bill contained to be true in such manner and form as the same are therein set forth and alleged."[1] This was a practice borrowed from the common law, and was probably intended to avoid conclusion in another suit;[2] but it is a needless form,[3] and may well be omitted.

§ 114. Statement of the extent of the demurrer.— If a demurrer be not to the whole bill, it must clearly express those parts which it is designed to cover.[1] "And this must be done not by way of exception, as by demurring to all except certain parts of the bill, but by a positive definition of the parts to which the defendant seeks to avoid making any answer."[2] A special demurrer should point out specifically by paragraph, page, or folio, or in some other distinct form of reference, the parts of the bill to which it is intended to apply.[3] When the bill was long, a special demurrer "to so much of the bill as seeks" certain relief, without further specifying the part demurred to, has been held bad.[4] A demurrer may, however, be expressed as to the whole bill except to a specified part.[5]

§ 115. Statement of causes of demurrer.— By the English practice a demurrer was required to contain a statement of its causes, otherwise it would be overruled.[1] It is the safer prac-

[2] Daniell's Ch. Pr. (2d Am. ed.) 652, 653.

[3] Daniell's Ch. Pr. (2d Am. ed.) 653; Smith v. Bryon, 3 Madd. 428.

§ 113. [1] Story's Eq., § 455, n. 3.

[2] Mitford's Pl., ch. 2, § 2; Taylor v. Holmes, 14 Fed. R. 498.

[3] Story's Eq. Pl., § 452.

§ 114. [1] Devonsher v. Newenham, 2 Sch. & Lef. 199; Chetwynd v. Lindon, 2 Ves. Sen. 450; Salkeld v. Science, 2 Ves. Sen. 107; Atwill v. Ferrett, 2 Blatchf. 39; Chicago, St. L. & N. O. R. Co. v. Macomb, 2 Fed. R. 18; Daniell's Ch. Pr. (2d Am. ed.) 653, 654; Story's Eq. Pl., §§ 457, 458.

[2] Story's Eq. Pl., § 457; Robinson v. Thompson, 2 Ves. & B. 118; Devonsher v. Newenham, 2 Sch. & Lef. 205.

[3] Atwill v. Ferrett, 2 Blatchf. 39; Chicago, St. L. & N. O. R. Co. v. Macomb, 2 Fed. R. 18.

[4] Atwill v. Ferrett, 2 Blatch. 39.

[5] Hicks v. Raincock, 1 Cox, 40; Howe v. Duppa, 1 Ves. & B. 511; Daniell's Ch. Pr. (2d Am. ed.) 654.

§ 115. [1] Langdell's Eq. Pl., § 96; Sanders' Orders, 180, 223; Duffield v.

tice for the pleader to comply with this. It was, however, said by a District Judge: "The formal statement of causes of a demurrer, though usual, is not necessary. The assertion of a general demurrer is that the plaintiff has not, on his own showing, made out a case. If the causes of demurrer are not formally set forth the plaintiff may object, and require them to be thus stated."[2] Demurrers are either general or special. They are general when no particular cause is assigned except the usual formulary, to comply with the rules of the court, that there is no equity in the bill.[3] Such a one is called a demurrer for want of equity. They are special when the particular defects or objections are pointed out. The former will be sufficient, although special causes are usually stated, when the bill is defective in substance. The latter is indispensable when the objection is to the defects of the bill in point of form.[4] But under a general demurrer a defendant may take advantage of a few objections which appear to be as to matters of form. Thus, under a demurrer for want of equity, the objection that a necessary affidavit is wanting, or that the plaintiff has not offered to do equity when that is required, may be raised.[5] So, may a lack of sufficient positiveness in the statement of facts in the bill,[6] and a misjoinder of plaintiffs by the addition of one with no interest in the subject of the bill.[7] But it has been held that a general demurrer for want of equity will not cover an objection to the discovery only. That, it was said, must be made the subject of a special demurrer.[8] A failure to aver that the invention covered by a patent had not been previously patented or described in any printed publication is a defect which can be raised by a special,[9] but not by a general, demurrer.[10] A defendant may,

Greaves, Cary, 125; Offeley v. Morgan, Cary, 153; Peachie v. Twyecrosse, Cary, 113; Daniell's Ch. Pr. (2d Am. ed.) 655.

[2] Taylor v. Holmes, 14 Fed. R. 498, 499, per Dick, D. J.

[3] Story's Eq. Pl., § 455; Langdell's Eq. Pl., § 95.

[4] *Supra*, § 111; Story's Eq. Pl., § 455. See also Beames' Orders in Ch. 77, 173; Mitford's Pl., ch. 2, § 2; Daniell's Ch. Pr. (2d Am. ed.) 655. But see Taylor v. Holmes, 14 Fed. R. 498, 499.

[5] Daniell's Ch. Pr. (2d Am. ed.) 655.

[6] Daniell's Ch. Pr. (2d Am. ed.) 655.

[7] Hodge v. North Mo. R. Co., 1 Dill. 104; Hubbard v. Manhattan Tr. Co., 87 Fed. R. 51.

[8] Whittingham v. Burgoyne, 3 Anst. 900; Daniell's Ch. Pr. (2d Am. ed.) 656.

[9] Overman Wheel Co. v. Elliot H. C. Co., 49 Fed. R. 859; Hanlon v.

[10] McCoy v. Nelson, 121 U. S. 484.

however, in cases where he demurs to the substance of the bill, in which term is included an apparent defect of jurisdiction, state specially the different grounds upon which he founds his objection;[11] and, indeed, some of these grounds of demurrer seem to require a more particular statement. Thus, a demurrer for want of parties should show who are the necessary parties that have been omitted, not necessarily by name, but in such a manner as to point out to the plaintiff the objections to his bill, so that he may amend by adding the proper parties.[12] But it has been said that this rule does not apply where it appears from the face of the bill that the plaintiff has sufficient information as to the names, interests, and residences of the proper parties.[13] It is said by Mr. Daniell that "in the case of a demurrer for multifariousness, a mere allegation 'that the bill is multifarious' will be *informal;* it should state, as the ground of demurrer, that the bill unites distinct matters upon one record, and show the inconvenience of so doing."[14] But the case cited by him does not seem to hold that the more general form is bad.[15] A defendant is not limited to show one cause of demurrer only; he may assign as many causes of demurrer as he pleases, either to the whole bill or to each part demurred to, and if any one of the causes of demurrer assigned hold good the demurrer will be allowed.[16] When, however, two or more causes of demurrer are shown to the whole bill the court will treat it as one demurrer; and if one of the causes be considered sufficient the order will be drawn up as upon a complete allowance of the demurrer.[17]

§ 116. Demurrers ore tenus.— At the hearing other causes of demurrer may be assigned orally; when the defendant is

Primrose, 56 Fed. R. 600; Hutton v. Star S. S. Co., 60 Fed. R. 747; Coop v. Dr. Savage P. D. Institute, 47 Fed. R. 899; Consol. B. S. Co. v. Detroit S. & S. Co., 47 Fed. R. 894.

[11] See, for example, the statement of causes for the demurrer in Pacific R. Co. of Mo. v. Mo. Pac. Ry. Co., 111 U. S. 505, 514.

[12] Daniell's Ch. Pr. (2d Am. ed.) 333, 655; Tourton v. Flower, 3 P. Wms. 369; Att'y-Gen. v. Jackson, 11 Ves. 369; Dwight v. Central Vt. R. Co., 9 Fed. R. 785; Taylor v. Holmes, 14 Fed. R. 498, 499; Glens Falls Nat. Bank v. Cramton, 72 Fed. R. 734.

[13] Taylor v. Holmes, 14 Fed. R. 498, 499.

[14] Daniell's Ch. Pr. (2d Am. ed.) 655.

[15] Rayner v. Julian, 2 Dickens, 677; s. c. more fully reported, 5 Madd. 144, note.

[16] Harrison v. Hogg, 2 Ves. Jr. 323; Jones v. Frost, 3 Madd. 9; s. c. on appeal, 1 Jacobs, 466.

[17] Wellesley v. Wellesley, 4 Myl. & Cr. 554; Daniell's Ch. Pr. (2d Am. ed.) 657.

said to demur *ore tenus*.[1] When such a demurrer only is sustained and the previously assigned causes are held bad, the defendant usually recovers no costs,[2] and often is obliged to pay costs.[3] But a demurrer *ore tenus* will, it has been said, never be allowed, unless there is a demurrer on record.[4] Thus, when there was a plea on record, and that was disallowed, a demurrer *ore tenus* was also disallowed.[5] A demurrer filed to a part cannot at the hearing *ore tenus* be extended to the whole of the bill; and such a demurrer is, it seems, only permitted for some cause which covers the whole extent of the demurrer filed.[6] It is doubtful whether by a demurrer *ore tenus* advantage can be taken of defects in form.[7]

§ 117. Prayer of judgment.— A demurrer, having assigned the cause or causes of its interposition, then proceeds to demand judgment of the court whether the defendant ought to be compelled to put in any further or other answer to the bill, or to such part thereof as is specified as the subject of demurrer; and concludes with a prayer that the defendant be dismissed, or, if to a part only, that he be excused from answering that part, with his reasonable costs in that behalf sustained.[1] When the demurrer is to a part only of the bill, the answer or plea to what remains usually follows the statement of the causes of demurrer, and the submission to the judgment of the court of the plaintiff's right to call upon the defendant to make further or other answer.[2]

§ 116. [1] Taylor v. Holmes, 14 Fed. R. 498; Brinkerhoff v. Brown, 6 J. Ch. (N. Y.) 149; Daniell's Ch. Pr. (2d Am. ed.) 657; Langdell's Eq. Pl., § 95; Story's Eq. Pl., § 464; Tourton v. Flower, 3 P. Wms. 371.

[2] Taylor v. Holmes, 14 Fed. R. 498, 499; Wright v. Dame, 1 Met. (Mass.) 237; Story's Eq. Pl., § 464; Daniell's Ch. Pr. 672. But see Rule 34.

[3] Langdell's Eq. Pl., § 95; Story's Eq. Pl., § 464; Atty. Gen. v. Brown, 1 Swanst. 265, 268; Mortimer v. Fraser, 2 Myl. & Cr. 178.

[4] Durdant v. Redman, 1 Vern. 78; Hook v. Dorman, 1 Sim. & S. 227; Story's Eq. Pl., § 464; Daniell's Ch. Pr. (2d Am. ed.) 668.

[5] Story's Eq. Pl., § 464; Durdant v. Redman, 1 Vern. 78; Atty. Gen. v. Brown, 1 Swanst. 288; Hook v. Dorman, 1 Sim. & S. 227.

[6] Equitable L. A. Soc. v. Patterson, 1 Fed. R. 126; Baker v. Mellish, 11 Ves. 70, 76; Story's Eq. Pl., § 464. But see Crouch v. Hickin, 1 Keen, 385; Board, etc. German Reformed Church v. Von Puechelstein, 27 N. J. Eq. 30. But see Garlick v. Strong, 3 Paige (N. Y.), 440.

[7] Story's Eq. Pl., § 443.

§ 117. [1] Daniell's Ch. Pr. (2d Am. ed.) 659.

[2] Daniell's Ch. Pr. (2d Am. ed.) 659.

§ 118. Certificate of counsel.— Every demurrer must be accompanied by a certificate of counsel, that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant that it is not interposed for delay.[1] Otherwise it may be disregarded.[2] The former remedy for this, as for any irregularity in form or in filing, was a motion to take the demurrer off the file.[3] It seems that the demurrer may be overruled for such an omission;[4] but the objection cannot be raised for the first time on appeal;[5] and the statement of the causes of the demurrer must be considered as grounds of objection to an interlocutory injunction.[6] Whether a certificate of counsel is required when the defendant appears in person, has not yet been decided in the Federal courts.[7]

§ 119. Motions to take demurrers off the file.— The remedy for an irregularity in the form or the manner of filing a demurrer, for example, if there be an error in its title, or it be filed too late, is by a motion to take it off the file.[1] When an order to that effect is granted, the cause stands in the same position as if no demurrer had been filed; and the defendant is at liberty to demur anew, or to plead or answer, as he may be advised.[2] The order that a demurrer be taken off the file may allow the defendant to file the same paper with the proper additions and corrections.[3] The application should be for an order "to take a certain paper purporting to be a demurrer" off the file.[4] A demurrer is not taken off the file by the mere entry of an order to that effect. The order should be taken to the clerk, who will withdraw the demurrer by annexing the order to it.[5] By setting the demurrer down for argument or

§ 118. [1] Rule 31.

[2] National Bank v. Insurance Co., 104 U. S. 54, 76; Sheffield Furnace Co. v. Witherow, 149 U. S. 574; Brazoria County v. Youngstown Br. Co., 80 Fed. R. 10.

[3] See *infra*, § 119; Daniell's Ch. Pr. (2d Am. ed.) 661–663; Ewing v. Blight, 3 Wall. Jr. 134.

[4] See U. S. R. S., § 747; 1 Hoffman's Ch. Pr. 97.

[5] Brazoria County v. Youngstown Br. Co., 80 Fed. R. 10.

[6] Preston v. Finley, 72 Fed. R. 850.

[7] Secor v. Singleton, 9 Fed. R. 809; s. c., 3 McCrary, 230.

§ 119. [1] Ewing v. Blight, 3 Wall. Jr. 134; Curzon v. De la Zouch, 1 Swanst. 193; Daniell's Ch. Pr. (2d Am. ed.) 661–663.

[2] Cust v. Boode, 1 Sim. & S. 21; Daniell's Ch. Pr. 663.

[3] Bailey W. M. Co. v. Young, 12 Blatchf. 199.

[4] Daniell's Ch. Pr. (2d Am. ed.) 732.

[5] Cust v. Boode, 1 Sim. & S. 21; Daniell's Ch. Pr. (2d Am. ed.) 663.

taking any other proceeding in the cause, all defects of form except the omission of the affidavit and certificate of counsel,[6] and any irregularity in filing it would probably be waived.

§ 120. Setting demurrer down for argument.— If the plaintiff fail to set down any plea or demurrer for argument on the rule-day when the same is filed, or on the next succeeding rule-day, he is deemed to admit the sufficiency thereof, and his bill is dismissed as of course, unless a judge of the court allows him further time for the purpose.[1] The defendant filing the demurrer is the only party that can have the bill dismissed upon this account.[2] The former English practice in setting a demurrer down for argument was for the plaintiff to obtain an order *ex parte*, upon petition for that purpose; and to serve the same upon the defendant's solicitor at least two days before the hearing.[3] In the different circuits of the United States the matter is usually regulated by local rule or custom.[4] The demurrer is not "ready for argument" until the rule-day after it is filed.[5] By the argument of a demurrer any informality or delay in setting it down for a hearing is waived.[6] It has been held, that a demurrer to a bill seeking an injunction must be decided, before a motion for an injunction noticed after the filing of the demurrer can be heard,[7] and before action is taken upon a plea subsequently or contemporaneously filed;[8] and that while a demurrer is pending undecided, the allegations of the bill must for the purposes of a motion be deemed admitted.[9]

§ 121. Argument of demurrer.— When a demurrer was called on for hearing and the defendant failed to appear, in the English practice the demurrer was struck out of the paper, unless the plaintiff had set down the demurrer, and could produce an affidavit of service upon the defendant or his solicitor of the order to set it down. If the plaintiff could produce

[6] National Bank v. Insurance Co., 104 U. S. 54, 76; Secor v. Singleton, 9 Fed. R. 809.

§ 120. [1] Equity Rule 88.

[2] Chicago & A. R. Co. v. Union Rolling Mill Co., 109 U. S. 702, 717.

[3] Daniell's Ch. Pr. (2d Am. ed.) 665, 666.

[4] See Gordon v. St. P. H. Works, 28 Fed. R. 147; Electrolibration Co. v. Jackson, 52 Fed. R. 773.

[5] Gillette v. Doheny, 65 Fed. R. 715.

[6] Electrolibration Co. v. Jackson, 52 Fed. R. 773.

[7] Ketchum v. Driggs, 6 McLean, 13.

[8] Campbell v. Mayor, 33 Fed. R. 795.

[9] Bayerque v. Cohen, M'Allister, 113.

such an affidavit, the demurrer was not necessarily overruled; but he had to be heard in support of the bill, the affidavit of service not authorizing the court, in the absence of the defendant, to overrule the demurrer, but to hear the plaintiff.[1] When the defendant appeared and the plaintiff did not, the demurrer was also struck out of the paper, unless the defendant could produce an affidavit of service upon himself of the order setting down the demurrer; or unless, in the event of the defendant having himself set down the demurrer, he could produce an affidavit of service upon the plaintiff or his solicitor. On the production of such an affidavit in either case, the defendant might have the demurrer allowed with costs.[2] Where a demurrer had been struck out of the paper, a fresh order had to be obtained for setting it down, which might be had either upon petition or motion.[3] The usual course of proceeding, when the demurrer came on for hearing, and all parties appeared, was generally for the junior counsel for the party setting the demurrer down for argument to open the pleadings, after which the counsel in support of the demurrer were heard, and next the plaintiff's counsel, and then the leading counsel for the demurring party replied.[4] The practice in these respects in the courts of the United States is very loose; it is sometimes regulated by the local rule, and often by a local custom, after the analogy of the State practice.

§ 122. Overruling a demurrer.— If upon the hearing any demurrer is overruled, the plaintiff is entitled to his costs in the cause up to that period, unless the court is satisfied that the defendant has good ground, in point of law or fact, to interpose the same, and it was not interposed vexatiously or for delay.[1] Upon the overruling of any demurrer, the defendant is assigned to answer the bill, or so much thereof as is covered by the demurrer, the next succeeding rule-day, or at such other period as, consistently with the rights of the defendant, the same can, in the judgment of the court, be reasonably done; in default whereof, the bill is to be taken against him *pro confesso*, and

§ 121. [1] Penfold v. Ramsbottom, 1 Swanst. 552; Daniell's Ch. Pr. (2d Am. ed.) 666, 667.

[2] Jennings v. Pearce, 1 Ves. Jr. 447.

[3] Tolson v. Lord Fitzwilliam, 4 Madd. 403.

[4] Daniell's Ch. Pr. (2d Am. ed.) 666, 667.

§ 122. [1] Equity Rule 84.

the matter thereof proceeded in and decreed accordingly.[2] If the plaintiff does not desire an answer, terms may be imposed as a condition upon the filing of an answer by the defendant.[3] A demurrer is presumed abandoned when the parties proceed to a hearing after an answer without argument of the demurrer.[4] When a demurrer both to the whole bill and to part thereof is sustained only as to a part, the proper decree is to dismiss so much of the bill as seeks relief in reference to the matters adjudged to be bad, overrule the demurrer to the residue, and direct the defendant to answer thereto.[5] When several defendants have joined in the demurrer, it may be sustained as to one of them, and overruled as to the rest.[6] "The court cannot let a demurrer stand for an answer, because it is a mute thing."[7] It must be either sustained or overruled. If, therefore, it is doubtful whether a demurrer should be sustained or not, the court will overrule it, and allow the same defense to be taken by answer;[8] or, even if it be not taken in the answer, may sustain it at the hearing.[9] By special leave, such a defense may also be made by a plea.[10] When the answer by supplying omissions in the bill establishes the complainant's case, a decree for him will not be reversed upon appeal, for an error in overruling a demurrer.[11] After a demurrer to the whole bill has been overruled, a second demurrer to the same extent cannot be allowed; for that would be in effect to rehear the case on the first demurrer; as, on argument of a demurrer, any cause of demurrer, though not shown in the demurrer as filed, may be alleged at the bar, and if good will support the demurrer.[12] A demurrer, however, of a less extensive nature may by special

[2] Ibid.

[3] Halderman v. Halderman, Hempst. 407.

[4] Basey v. Gallagher, 20 Wall. 670.

[5] Powder Co. v. Powder Works, 98 U. S. 126.

[6] Mayor of London v. Levy, 8 Ves. 403, 404; Story's Eq. Pl., § 445.

[7] Ch. Hardwicke, in Anon., 3 Atk. 580.

[8] Storms v. Kansas P. Ry. Co., 5 Dill. 486; Bromley v. Jeffersonville, 3 McLean, 336; Standard Oil Co. v. So. Pac. Ry. Co., 42 Fed. R. 295. See Crawford v. The William Penn, 3 Wash. 484.

[9] Johnasson v. Bonhote, L. R. 2 Ch. D. 298.

[10] Daniell's Ch. Pr. (2d Am. ed.) 675; Rowley v. Eccles, 1 S. & S. 512.

[11] Cavender v. Cavender, 114 U. S. 464. See also West v. Randall, 2 Mason, 181.

[12] Daniell's Ch. Pr. (2d Am. ed.) 674.

leave of the court be subsequently put in;[13] and an amendment of a demurrer confining it to a part of the bill may also be allowed.[14]

§ 123. Sustaining a demurrer.—If upon the hearing any demurrer be allowed, the defendant is entitled to his costs.[1] But the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill upon such terms as it shall deem reasonable.[2] When a demurrer *ore tenus* is sustained,[3] the defendant receives no costs, and perhaps may be ordered to pay costs.[4] If the defect in the bill be clearly one that goes to the whole equity of the plaintiff's case, leave to amend will not be granted.[5] According to Lord Cottenham, "it is not usual, upon allowing a general demurrer, to give leave to amend; but it may be done. It is in the discretion of the court so to do."[6] And although courts are now very liberal in allowing amendments, leave to amend may be refused when the case of the defendant is a hard one, and he is free from wrong-doing, while the plaintiff has had an opportunity to plead the new matter when his bill was first drawn.[7] Leave to amend is now usually granted upon payment of costs, and almost invariably when the defect in the bill consists in the misjoinder of parties,[8] or the omission of those who can be served without ousting the court of jurisdiction.[9] It has been held that a paper defective as a bill in equity may be sustained as a petition on an appeal from condemnation proceedings under a special statute.[10] Where the court erroneously

[13] Thorpe v. Macauley, 5 Madd. 218, 231.

[14] Glegg v. Legh, 4 Madd. 193, 207; Baker v. Mellish, 11 Ves. 70; Atwill v. Ferrett, 2 Blatchf. 39, 49.

§ 123. [1] Rule 34.

[2] Rule 34; *infra*, § 161.

[3] Taylor v. Holmes, 14 Fed. R. 498; Brinkerhoff v. Brown, 6 J. Ch. (N. Y.) 149; Langdell's Eq. Pl., § 95; Story's Eq. Pl., § 464; Daniell's Ch. Pr. (2d Am. ed.) 672.

[4] Langdell's Eq. Pl., § 95; Lord Clarendon's Orders, May 22, 1661; 1 Sanders' Orders, 298.

[5] Langdell's Eq. Pl., § 96; Tyler v. Bell, 2 Myl. & Cr. 89; Lowe v. Farlie, 2 Madd. 101; Walker v. Powers, 104 U. S. 245.

[6] Wellesley v. Wellesley, 4 Myl. & Cr. 554, 558.

[7] Dowell v. Applegate, 8 Fed. R. 698; s. c., 7 Saw. 232.

[8] Aylwin v. Bray, 2 Y. & J. 518, note; Tryon v. Westminster Imp. Com'rs, 6 Jurist (N. S.), 1324.

[9] M'Elwain v. Willis, 3 Paige (N. Y.), 505. See Walker v. Powers, 104 U. S. 245, 252.

[10] Cherokee Nation v. S. K. Ry. Co., 135 U. S. 641, 651.

ordered a demurrer and at the final hearing dismissed the bill, although the evidence showed equities in favor of the complainants, the Circuit Court of Appeals reversed the decree and directed that the bill be dismissed without prejudice.[11] Where a bill is dismissed because there is an adequate remedy at law, the decree of dismissal should be without prejudice to a suit at law.[12]

[11] Wood v. Collins, 60 Fed. R. 139. See *infra*, § 800.

[12] Sanders v. Devereux, 60 Fed. R. 311; *infra*, § 800.

CHAPTER IX.

PLEAS.

§ 124. Definition and classification of pleas.— A plea is a pleading which sets up some reason not apparent upon the face of the bill why the defendant should not be obliged to answer the whole or a part thereof. Lord Redesdale defines a plea as "a special answer to a bill, differing in this from an answer in the common form, as it demanded the judgment of the court, in the first instance, whether the special matter urged by it did not debar the plaintiff from his title to that answer which the bill required."[1] A plea may be to the whole or to a part of the bill.[2] Usually but a single ground of defense can be presented by a plea, which, though it may state more than one fact, must bring the matters in issue to a single point.[3] Otherwise, it is open to the charge of duplicity and multifariousness, and will be overruled.[4] If a bill contain different prayers for

§ 124. [1] Roche v. Morgell, 2 Sch. & Lef. 721, 725.

[2] Rule 32.

[3] Whitbread v. Brockhurst, 1 Brown, Ch. C. 404, 416, note 9; s. c., 2 Ves. & Bea. 154, note; Watkins v. Stone, 2 Sim. 49; Rhode Island v. Massachusetts, 14 Pet. 210, 259; Story's Eq. Pl., § 654. See Rhino v. Emery, 79 Fed. R. 483.

[4] Rhode Island v. Massachusetts, 14 Pet. 210, 259; Gaines v. Mausseaux, 1 Woods, 118; Whitbread v. Brockhurst, 1 Brown, Ch. C. 404, 416, note 9; s. c., 2 Ves. & Bea. 154, note; London v. Liverpool, 3 Anst. 788; Watkins v. Stone, 2 Simons, 49; Saltus v. Tobias, 7 J. Ch. (N. Y.) 214; Giant Powder Co. v. Safety N. P. Co., 19 Fed. R. 509; M'Closkey v. Barr, 38 Fed. R. 165; Story's Eq. Pl., §§ 653–655. But see Reissner v. Anness, 12 Off. Gaz. 842; s. c., 3 Bann. & A. Pat. Cas. 148; MacVeagh v. Denver C. W. W. Co., 85 Fed. R. 74; Société Fabriques v. Lueders, 105 Fed. R. 632; Hazard v. Durant, 25 Fed. R. 26; Fayerweather v. Hamilton College, 108 Fed. R. 546. A plea to the jurisdiction which set up matters affecting the validity of the service, matters showing want of the requisite difference of citizenship, and pendency of a prior suit was overruled for duplicity. Briggs v. Stroud, 58 Fed. R. 717. So was a plea to a suit upon a bond of indemnity against loss by embezzlement, which set up, as a defense, misrepresentations as to the previous condition of the embezzler's accounts, and averred that the plaintiff knew or ought to have known that he was a defaulter. Supreme Council v. Fidelity & C. Co., 63 Fed. R. 48. And a plea to a bill for the infringement of a patent which alleged that, dur-

relief based upon different grounds, the defendant may file a plea to each part of the relief.[5] And in other cases, where great inconvenience can thus be saved, the court may upon motion, after notice to the complainant's solicitor, give special leave to file a double plea,[6] or rather, according to Professor Langdell,[7] two separate pleas, each containing a single defense. It has been held that the question whether a patent has been infringed cannot be raised by a plea,[8] except under extraordinary circumstances.[9] A plea must not contain inconsistent allegations, as "a plea of the Statute of Limitations and of liability never incurred."[10] Nor, it has been said, can a plea properly raise by averment an issue "not raised by the bill."[11] But, if the plea be otherwise good, immaterial allegations will not vitiate it.[12] Matters that have occurred since the filing of the bill may be set up by plea provided the time for filing the plea has not elapsed.[13] Otherwise, such matters can only be pleaded by a supplemental answer or cross-bill.[14] A plea should state facts, not arguments and conclusions of law, which will be disregarded.[15] Thus, it has been held that pleas which state that

ing part of the time described in the bill, the defendant made the patented device with the consent of the complainant, and that on other occasions he did not infringe. Knox R. Co. v. Rairdon Stone Co., 87 Fed. R. 969. But a plea was held to make a single issue where it averred that the defendant never made, used or sold any article embodying the invention which he was charged with infringing, and that the alleged infringement was committed, if at all, by a foreign corporation of which he was an officer. Leatherbee v. Brown, 69 Fed. R. 590.

[5] Emmott v. Mitchell, 14 Sim. 432.

[6] Gibson v. Whitehead, 4 Madd. 241; Kay v. Marshall, 1 Keen, 190.

[7] Langdell's Eq. Pl., § 98. Thus, in England, a defendant to a bill for an injunction against the infringement of a patent and for an account was allowed to file a double plea, "namely, first, that the invention was not useful, and secondly, that it was not new." Kay v. Marshall, 1 Keen, 190, 192. But see Reissner v. Anness, 12 Off. Gaz. 842; s. c., 3 Bann. & A. Pat. Cas. 148.

[8] Korn v. Wiebusch, 33 Fed. R. 50; Hubbell v. De Land, 14 Fed. R. 471, 474.

[9] Union S. & S. Co. v. Phila. S. R. Co., 69 Fed. R. 833; Knox R. B. Co. v. Rairdon Stone Co., 87 Fed. R. 969; Germain v. Wilgus (C. C. A.), 67 Fed. R. 597; Leatherbee v. Brown, 69 Fed. R. 590.

[10] Emmott v. Mitchell, 14 Sim. 432; Story's Eq. Pl., §§ 656, 657.

[11] Emmott v. Mitchell, 14 Sim. 432, 436.

[12] Ibid. But see Rhode Island v. Massachusetts, 14 Pet. 210, 270.

[13] Rhode Island v. Massachusetts, 14 Pet. 210, 270; Claridge v. Hoare, 14 Ves. 59.

[14] Earl of Leicester v. Perry, 1 Brown Ch. C. 305; Turner v. Robinson, 1 Sim. & S. 3.

[15] Miller v. Fenton, 11 Paige (N. Y.),

defendant "is the sole owner in fee simple of the entire title of" the land which is the subject of the suit; "that, at the time of the bringing of this suit and long prior thereto, this defendant was and still is in the open, notorious, continuous, and exclusive possession of the said premises as the sole owner thereof, and claiming and holding adversely to the complainants and all the world;" and "that the said complainants were, at the time of bringing this suit and long prior thereto, ousted and disseized and out of possession of said premises," are bad.[16] Pleas are either pure, negative, or anomalous. A pure plea sets up new matter as a defense which is not apparent upon the face of the bill.[17] A negative plea, which is sometimes also termed an anomalous plea, merely denies certain allegations contained in the bill.[18] An anomalous plea sets up a fact in avoidance of the bill, but one which the bill has anticipated and without confessing replied to.[19] Now that the benefits of discovery can be obtained at common law, negative and anomalous pleas are rarely used;[20] and the learning and subtlety which have been displayed in discussing their characteristics are of little service, except as a means of mental discipline or for the gratification of an antiquarian taste. Those interested in studying their history and refinements are referred to the works of Beames on Pleas, Wigram on Discovery, and Langdell on Equity Pleading, where they will find the subject discussed at length, with full references to the cases. Pleas are either to the relief or to the discovery; and pleas to the relief are either pleas in abatement or pleas in bar.

§ 125. Pleas in abatement in general.—The books which recognize pleas in abatement include among them pleas to the

18; Daniell's Ch. Pr. (5th Am. ed.) 607; Westinghouse El. & Mfg. Co. v. Stanley, 65 Fed. R. 821.

[16] Beames on Pleas, 22, 23; Jerrard v. Saunders, 2 Ves. Jr. 187; National Bank v. Insurance Co., 104 U. S. 54; Wood v. Mann, 1 Sumn. 506; McCloskey v. Barr, 38 Fed. R. 165; Emma S. M. Co. v. Emma S. M. Co. of N. Y., 1 Fed. R. 89; Hudson v. Randolph, 66 Fed. R. 216.

[17] McCloskey v. Barr, 38 Fed. R. 165.

[18] Story's Eq. Pl., § 651; Rhino v. Emery, 79 Fed. R. 483.

[19] Langdell's Eq. Pl., § 102; Story's Eq. Pl., § 651; McDonald v. Salem C. F. M. Co., 81 Fed. R. 577; McCloskey v. Barr, 38 Fed. R. 165; Hilton v. Guyott, 42 Fed. R. 249. But see Milligan v. Milledge, 3 Cr. 220.

[20] See, however, Rhino v. Emery, 79 Fed. R. 483.

jurisdiction, pleas to the person, and pleas to the bill.[1] Matters in abatement can, in general, only be set up by plea or demurrer; and a defendant, by answering or pleading in bar, waives any such objection.[2] But the act of March 3, 1875, provides "that if in any suit commenced in a Circuit Court, or removed from a State court to a Circuit Court of the United States, it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed as justice may require, and shall make such order as to costs as shall be just."[3] It has been held that a denial of the allegations in the bill as to the difference of citizenship,[4] or of the value of the matter in dispute,[5] should be made by a plea in abatement, and if set up by answer may be disregarded. The objection that there is no jurisdiction in equity because the complainant has an adequate remedy at law may be taken by demurrer, plea, or answer.[6] Otherwise, the defendant waives the right to make it,[7] although the court may for its own protection dismiss a bill for this reason at the final hearing when the pleadings are silent upon the subject.[8] The reference of the matter in dispute to an arbi-

§ 125. [1] See Beames on Pleas, ch. 2; Story's Eq. Pl., §§ 705–708; Rule 39; Memphis City v. Dean, 8 Wall. 64.

[2] Beames on Pleas (1st Am. ed.), 63, 64; Story's Eq. Pl., § 708; Rule 39; Livingston v. Story, 11 Pet. 351, 393; Wickliffe v. Owings, 27 How. 47, 52; Rubber Co. v. Goodyear, 9 Wall. 788, 792; Wood v. Mann, 1 Sumn. 506; Dodge v. Perkins, 4 Mason, 435; Cittredge v. Claremont Bank, 3 Story, 590; Doggett v. Emerson, 1 Woodb. & M. 196; Blackburn v. Selma, M. & M. R. Co., 2 Flip. 525; Emerson Co. v. Nimocks, 88 Fed. R. 280.

[3] Act of March 3, 1875, § 5; U. S. R. S. 1 Supp. 175; 18 St. at L. 470; re-enacted March 3, 1887, 24 St. at L., ch. 373; *infra*, § 293. See Nashua & L. R. Co. v. Boston & L. R. Co., 136 U. S. 356, 474.

[4] Wickliffe v. Owings, 17 How. 47.

[5] Butchers' & Drovers' Stock Yards v. Louisville & N. J. Co., 67 Fed. R. 35.

[6] Reynes v. Dumont, 130 U. S. 354, 395; Wylie v. Coxe, 15 How. 415; Kilbourn v. Sunderland, 130 U. S. 505.

[7] Reynes v. Dumont, 130 U. S. 354; Wylie v. Coxe, 15 How. 415.

[8] Parker v. Winnipiseogee Lake C. & W. Co., 2 Black, 545, 550; Lewis v. Cocks, 23 Wall. 466; Oelrichs v. Spain, 15 Wall. 211.

trator, under an agreement that his award shall be made the basis of a decree, is a waiver of such an objection.[9]

§ 126. Pleas to the jurisdiction.— Pleas to the jurisdiction are: (1) That the subject of the suit is not within the jurisdiction of a court of equity;[1] (2) that some other court of equity has the proper jurisdiction;[2] (3) that the defendant has not been properly served with process.[3]

§ 127. Pleas to the person.— Pleas to the person are: (1) That the plaintiff has not the legal capacity to sue either at all if an alien enemy,[1] or alone if an infant,[2] or without leave from the court as a receiver.[3] (2) That the plaintiff is not the person whom he pretends to be, or does not sustain the character which he assumes; as, for example, that he is not executor,[4] or not assignee,[5] or not a corporation,[6] when suing as such; or that the suit is brought in the name of a fictitious person;[7] or that it is brought in the name of a person who sues for the benefit of another, through collusion or champerty;[8] or, it seems, in a stockholder's suit founded upon a right which may properly be asserted by the corporation, that the corporation has not refused to sue.[9] It has been held that the objection that the plaintiff is a lunatic and cannot sue without a next friend cannot be taken by plea, and that the proper course for the defendant is to move either to strike the bill off the file on account of the complainant's mental incapacity, or for a stay of the proceedings until a committee or next friend is appointed.[10] (3) That the defendant cannot be sued except upon the happening of some event which has not occurred, as

[9] Strong v. Wiley, 104 U. S. 512.

§ 126. [1] Story's Eq. Pl., §§ 710–713.

[2] Story's Eq. Pl., §§ 714–716.

[3] Larned v. Griffin, 12 Fed. R. 590; Williams v. Empire Tr. Co., 1 N. J. L. J. 315.

§ 127. [1] Albrech v. Sussman, 2 V. & B. 323; Story's Eq. Pl., § 724; Mumford v. Mumford, 1 Gall. 366.

[2] Story's Eq. Pl., § 725. But see Dudgeon v. Watson, 23 Fed. R. 161.

[3] See Newman v. Moody, 19 Fed. R. 858.

[4] See Rubber Co. v. Goodyear, 9 Wall. 788, 792; Ord v. Huddleston, 2 Dick. 510; Story's Eq. Pl., § 727.

[5] Nicholas v. Murray, 5 Saw. 320.

[6] Dental V. Co. v. Wetherbee, 2 Cliff. 555; Blackburn v. Selma, M. & M. R. Co., 2 Flip. 525; Emerson Co. v. Nimocks, 88 Fed. R. 280.

[7] Chapman v. School Dist. No. 1, Deady, 108, 116.

[8] Dinsmore v. Central R. Co., 19 Fed. R. 153. But see Sperry v. Erie Ry. Co., 6 Blatchf. 425.

[9] Newby v. Oregon Cent. Ry. Co., 1 Saw. 63, 67.

[10] Dudgeon v. Watson, 23 Fed. R. 161.

under the former practice, that he is a receiver, and no leave to sue him has been obtained from the court by which he was appointed.[11] (4) That the defendant is not the person he is alleged to be, or does not sustain the character which he is alleged to bear;[12] or that the person named as a defendant is not a corporation when sued as such,—in which case the person served with process on its behalf may file the plea in his own name,[13] or was not incorporated under the laws of the State which is named in the bill as its creator;[14] or that the defendant has become a bankrupt or insolvent, and his interest in the subject-matter has passed to his assignee.[15]

§ 128. Pleas to the bill.—Pleas to the bill are: (1) That there is another suit depending in a domestic court of equity for the same matter. (2) That there is a want of proper parties. (3) That the bill will cause an improper multiplicity of suits. (4) Multifariousness.[1] Of these the first two are the only ones of much practical importance. It is doubtful whether either of the last two has ever been successfully maintained.[2] Judge Story thus speaks of them: "Thirdly, the plea of multiplicity of suits. This objection also may be taken by way of plea, for it is against the whole policy of courts of equity to encourage multiplicity of suits. Indeed, this constitutes one main ground of the objection of the want of sufficient parties, since its tendency is to multiply litigation. Fourthly, the plea of multifariousness, or of joining and confounding distinct matters in one bill. Generally this objection is apparent on the face of the bill, and then it could be taken by way of demurrer. But, in case the bill is so artfully framed that from that or from some other cause the objection does not appear on the face of the bill, the defendant may take advantage thereof by setting forth the special matter by a plea."[3] Where the bill was filed

[11] Barton v. Barbour, 104 U. S. 126; Jerome v. McCarter, 94 U. S. 734, 737; In re Young, 7 Fed. R. 855. But see 24 St. at L., ch. 373, § 3; *infra*, § 251.

[12] Story's Eq. Pl., §§ 732–734.

[13] Kelly v. Mississippi C. R. Co., 1 Fed. R. 564; s. c., 2 Flip. 581. See also Williams v. Empire Tr. Co., 1 N. J. L. J. 315.

[14] Blackburn v. Selma, M. & M. R. Co., 2 Flip. 525.

[15] Kittredge v. Claremont Bank, 3 Story, 590; Story's Eq. Pl., § 732. See also Doggett v. Emerson, 1 Woodb. & M. 196.

§ 128. [1] Story's Eq. Pl., §§ 735–748.

[2] Benson v. Hadfield, 4 Hare, 32, 39; M'Closkey v. Barr, 38 Fed. R. 165.

[3] Story's Eq. Pl., §§ 746, 749. See also Benson v. Hadfield, 4 Hare, 32.

to restrain the infringement of five patents, and stated that the defendant made and sold for use "soda-water fountains, each made according to, and employing and containing, the inventions described and claimed in each of the above-named letters-patent and reissued letters-patent;" a plea was overruled, which set up as a defense, that all of the letters-patent described in the bill were, as the bill showed, for separate and distinct inventions, "which several alleged inventions are not, in point of fact, connected together in use or operation, and are not, in point of fact, conjointly embodied in any of the soda-water and other fountains manufactured, used, or sold, by this defendant; so that the said plaintiff, by his single bill of complaint aforesaid, seeks to compel this defendant to unite five separate and distinct defenses depending upon distinct and different proofs, so as to complicate the defense and embarrass this defendant in his answer to the said complaint; and that it is not true, as alleged in said bill, that the said defendant has made, constructed, used, and vended to others to be used, soda-water and other fountains, each made according to, and employing and containing, the inventions described and claimed in each of the above-named letters-patent and reissued letters-patent."[4]

§ 129. Pleas of pendency of another suit.— A plea that another suit in equity is pending for the same cause in the same court is, if true, a sufficient defense to a bill.[1] The pendency of an action at law for the same matter is not, however, in itself a defense.[2] For the very fact that relief cannot be had at law is the usual ground for resorting to equity. So the pendency of an action at law upon a contract was held to be no bar to a subsequent bill in equity by the same plaintiff to reform it so as to obviate a cross-action on the contract by the defendant.[3] If, however, there appears to be no sufficient reason for the maintenance of both, the court at equity may, after

[4] Matthews v. Lalance & G. Mfg. Co., 2 Fed. R. 232.

§ 129. [1] Mitford's Pl., ch. 2, § 2, part 2; Story's Eq. Pl., § 736; Urlin v. Hudson, 1 Vern. 332; Foster v. Vassall, 3 Atk. 587, 590; Crofts v. Wortley, 1 Ch. Ca. 241; Tarleton v. Barnes, 2 Keen, 632, 635; Insurance Co. v. Brune, 96 U. S. 588, 592, 593. See also Memphis v. Dean, 8 Wall. 64.

[2] Graham v. Meyer, 4 Blatchf. 129; Thorne v. Towanda T. Co., 15 Fed. R. 289, 292.

[3] Providence S. E. Co. v. Hathaway Mfg. Co., 79 Fed. R. 512.

the defendant has answered, put the plaintiff to his election, whether he will proceed at law or in equity; and if he elects the latter, then his proceeding at law will be enjoined; if the former, his bill will be dismissed.[4] The pendency of another suit in a court of another of the United States, or of a foreign country, is not a bar to a suit for the same relief in a Circuit Court of the United States,[5] at least when the object is not to obtain the possession of property in the custody of the former court.[6] Nor, it seems, although there the authorities are conflicting,[7] is the pendency of a similar suit in a court held within the same State where the Federal court is held,[8] but it is usually a ground for a stay of its own proceedings by the Federal court.[9] The effect of the pendency of another suit for the same cause in another court of the United States has never been expressly decided.[10] A plea that another suit is pending, in which the complainant might obtain by cross-bill the relief now sought by him, is bad.[11] A plea of *lis pendens* should set forth the commencement of the former suit, its general nature, character, and objects, whether it is at law or in equity, the relief prayed, and how far it has progressed;[12] it should then

[4] Story's Eq. Pl., § 742; Beames' Orders in Ch., 11, 12; Mitford's Pl., ch. 2, § 2, part 2; Royle v. Wynne, 1 C. & Ph. 252; Thorne v. Towanda T. Co., 15 Fed. R. 289, 292; *infra*, § 295.

[5] Insurance Co. v. Brune, 96 U. S. 588, 592, 593; Stanton v. Embrey, 93 U. S. 548; Lord Dillon v. Alvares, 4 Ves. 357. See Story's Eq. Pl., § 747.

[6] Briggs v. Stroud, 58 Fed. R. 717, 720; *supra*, § 9.

[7] See Radford v. Folsom, 14 Fed. R. 97; Brooks v. Mills County, 4 Dill. 524; Lawrence v. Remington, 6 Biss. 44; Marks v. Marks, 75 Fed. R. 321.

[8] Latham v. Chafee, 7 Fed. R. 520; White v. Whitman, 1 Curt. 494; Sharon v. Hill, 22 Fed. R. 28; Washburn & M. Mfg. Co. v. Scutt, 22 Fed. R. 710; Loring v. Marsh, 2 Cliff. 322; Gordon v. Gilfoil, 99 U. S. 168, 178; Dwight v. Cent. Vt. R. Co., 9 Fed. R. 785; Crescent City L. S. Co. v. Butchers' U. L. S. Co., 12 Fed. R. 225; North Muskegon v. Clark (C. C. A.), 62 Fed. R. 694; Marshall v. Otto, 59 Fed. R. 249; Rejall v. Greenhood, 60 Fed. R. 884; Short v. Hepburn, 75 Fed. R. 113; Shaw v. Lyman, 79 Fed. R. 2. But see Gamble v. San Diego, 79 Fed. R. 487, and *supra*, § 9.

[9] Foley v. Hartley, 72 Fed. R. 570; Zimmerman v. So Relle (C. C. A.), 80 Fed. R. 417; Hughes v. Green (C. C. A.), 84 Fed. R. 833; Green v. Underwood, 86 Fed. R. 427. See Hughes v. Green, 75 Fed. R. 693.

[10] See Wheeler v. McCormick, 8 Blatchf. 267; Steiger v. Heidelberger, 4 Fed. R. 455; s. c., 18 Blatchf. 426; Brooks v. Mills County, 4 Dill. 524, 527.

[11] Washburn & M. Mfg. Co. v. Scutt, 22 Fed. R. 710.

[12] Crescent City L. S. Co. v. Butchers' U. L. S. Co., 12 Fed. R. 225; Green v. Underwood (C. C. A.), 86 Fed. R. 427; Foster v. Vassal, 3 Atk. 589, 590; Story's Eq. Pl., § 737.

aver specifically that the second suit is for the same subject-matter[13] as the first, and seeks the same or similar relief;[14] and further, that the former suit is still depending.[15] It must show that the defendant was served or has appeared in the former suit.[16] "For it is no suit depending till the parties have appeared or been served to appear, but only a piece of parchment thrown into the office, which may lie there forever, and never come to a suit."[17] "It is not necessary to the sufficiency of the plea that the former suit should be precisely between the same parties as the latter. For if a man institutes a suit, and afterwards sells part of the property in question to another, who files an original bill touching the part so purchased by him, a plea of the former suit depending touching the whole property will hold.[18] So where one part-owner of a ship filed a bill against the husband for an account, and afterwards the same part-owner and the rest of the owners filed a bill for the same purpose, the pendency of the first suit was held a good plea to the last;[19] for though the first bill was insufficient for want of parties, yet by the second bill the defendant was doubly vexed for the same cause. The course which the court has taken in such case has been to dismiss the first bill, and to direct the defendant in the second cause to answer upon being paid the costs of the plea allowed."[20] Where a former suit had been brought for a part, but not the whole, of the relief sought in the case at bar, the court held its pendency no defense, but said that proceedings in it might be stayed until the determination of the second suit.[21] "Where a second bill is brought by the same person for the same purpose, but in a different right, as where the executor of an administrator brought a bill conceiving himself to be the personal representative of the intestate, and afterwards procured administration *de bonis*

[13] Devie v. Lord Brownlow, 2 Dick. 611; Mitford's Pl., ch. 2, § 2, part 2; Story's Eq. Pl., § 737.

[14] Behrens v. Sieveking, 2 Myl. & Cr. 602; Wheeler v. McCormick, 8 Blatchf. 267; Jenkins v. Eldredge, 3 Story, 183; Story's Eq. Pl., § 737.

[15] The Haytian Republic, 57 Fed. R. 508. 512; Story's Eq. Pl., § 737. See Urlin v. Hudson, 1 Vern. 332; Mitford's Pl., ch. 2, § 2, part 2.

[16] Moor v. Welsh C. Co., 1 Eq. Cas. Abr. 89, pl. 14.

[17] Ibid.

[18] Ibid.

[19] Durand v. Hutchinson, Mich. 1771, in Chan.

[20] Mitford's Pl., ch. 2, § 2, part 2, citing Crofts v. Wortley, 1 Ch. Cas. 241.

[21] Mass. Mut. L. I. Co. v. Chicago & A. R. Co., 13 Fed. R. 857.

non, and brought another bill, the pendency of the former bill is not a good plea.[22] The reason of this determination seems to have been, that, the first bill being wholly irregular, the plaintiff could have no benefit from it, and it might have been dismissed upon demurrer. Where a decree is made upon a bill brought by a creditor on behalf of himself and all other creditors of the same person, and another creditor comes in before the master to take the benefit of the decree, and proves his debt, and then files a bill on behalf of himself and the other creditors, the defendants may plead the pendency of the former suit; for a man coming in under a decree is *quasi* a party."[23] The pendency of a taxpayer's bill in the same court was held to be a defense to a bill by other taxpayers for the same relief.[24] When, after a bill has been filed to restrain the infringement of a patent and to obtain an account of profits, the defendant continues his infringements, the pendency of the first is no objection to a second bill seeking an injunction, and an account founded upon the subsequent infringements.[25] And notwithstanding a decree for an injunction in the former suit, a decree for an injunction and account was granted in that for the subsequent infringements, the second injunction being useless except to support the equitable jurisdiction.[26] According to Lord Redesdale, "as the pendency of the former suit, unless admitted by the plaintiff, is made the immediate subject of inquiry by one of the masters, a plea of this kind is not put in upon oath."[27] An oath is, however, required in all cases by the Federal equity rules.[28]

§ 130. Plea of want of parties.— The plea of want of parties is sometimes included among pleas in bar.[1] The same defense may be made by answer;[2] and the court has refused to allow

[22] Huggins v. York B. Co., 2 Atk. 44.

[23] Mitford's Pl., ch. 2, § 2, part 2, citing upon last point, Neve v. Weston, 3 Atk. 557.

[24] Gamble v. San Diego, 79 Fed. R. 487.

[25] Wheeler v. McCormick, 8 Blatchf. 267; Roemer v. Newwan, 19 Fed. R. 98; Higby v. Columbia R. Co., 18 Fed. R. 601. *Contra*, Gold & Stock Tel. Co. v. Pearce, 19 Fed. R. 419.

[26] Horton v. N. Y. C. & H. R. R. Co., 63 Fed. R. 897.

[27] Mitford's Pl., ch. 2, § 2, part 2, citing Urlin v. Hudson, 1 Vern. 332. But see Zimmerman v. So Relle, 80 Fed. R. 417; *infra*, § 141.

[28] Equity Rule 31; *infra*, § 136.

§ 130. [1] Mitford's Pl., ch. 2, § 2, part 2. See, however, Story's Eq. Pl., § 744, and citations.

[2] U. S. v. Gillespie, 6 Fed. R. 803. See Rule 52.

it to be set up by plea upon the ground that the same defense can be considered with more convenience and expedition when pleaded in an answer.[3] Such a plea must state the names, if known, of all the persons for whose omission the defendant claims that the bill is defective;[4] and the reasons why their presence is required in the suit.[5] It should also state that they are living, and, unless they are in every aspect of the bill indispensable parties to it, that they are within the jurisdiction of the court.[6] After a plea for want of parties has been sustained, and the bill amended by adding thereto the parties named in the plea, a second plea further objecting to the bill for the omission of other parties not named in the first plea cannot be filed.[7] A plea to the whole bill for want of parties will be overruled if, in any aspect of the bill, the parties therein named would not be necessary.[8]

§ 131. Pleas of statutes.— Pleas in bar set up some reason founded on the substance of the case, why the plaintiff is not entitled to relief. They rest upon some matter created either by statute, matter of record, or matter *in pais*, which last term signifies a matter of fact which is not of record, and is not given by statute special effect. Pleas founded upon matter that is made a bar by statute rest upon the statute of limitations, the statute of frauds, or less frequently some other statute. Federal courts of equity are not bound by State statutes of limitation,[1] except in cases where their jurisdiction is concurrent with the jurisdiction at common law;[2] but they will usually follow them,[3] unless injustice would otherwise be done,[4] thus enforcing the doctrine of equitable laches; and they will do so especially when suits are brought against executors,[5] or to foreclose mortgages.[6] Moreover, the lapse of time for a shorter period than

[3] Ibid.

[4] Atty. Gen. v. Jackson, 11 Ves. 367, 369; Cook v. Mancius, 3 Johns. Ch. (N. Y.) 427; Dwight v. Central Vt. R. Co., 9 Fed. R. 785; Campbell v. James, 2 Fed. R. 338, 348.

[5] Sheffield v. Newman, 77 Fed. R. 789.

[6] Goodyear v. Toby, 6 Blatchf. 138.

[7] Rawlins v. Dalton, 3 Y. & Coll. 447.

[8] Homan v. Shiel, 2 Jones (Irish), 164.

§ 131. [1] Johnson v. Roe, 1 Fed. R. 692; Etting v. Marx's Ex'r, 4 Fed. R. 673. But see Pratt v. Northam, 5 Mason, 95; *supra*, § 8.

[2] Wagner v. Baird, 7 How. 234, 258; Godden v. Kimmell, 99 U. S. 201; Wilson v. Koontz, 7 Cranch, 202.

[3] Godden v. Kimmell, 99 U. S. 201; Meath v. Phillips Co., 108 U. S. 553.

[4] Fogg v. St. Louis, H. & K. R. Co., 17 Fed. R. 871, 873.

[5] Pulliam v. Pulliam, 10 Fed. R. 58; Broderick's Will, 21 Wall. 503.

[6] Cleveland Ins. Co. v. Reed, 1 Biss. 180.

the statute of limitations, and in cases to which that statute does not apply, will often be held such laches as to bar the complainant.[7] It is not laches for a complainant to delay asserting his rights until the determination in another suit, brought by himself or another in a similar position, of a doubtful question of law materially affecting their validity.[8] The United States are not bound by laches;[9] and the State statutes of limitations do not affect them,[10] even, it has been said, if specially named therein.[11] The United States may plead a State statute of limitations which does not name them;[12] and so may officers of the United States in possession of property claimed by the government.[13] Laches may be set up by plea.[14] Laches or the statute of limitations may be pleaded to a bill to remove a cloud on title filed by one out of possession.[15] An individual seeking to enforce by subrogation the rights of a State may be estopped by laches of the State which would not have affected the State itself.[16] Municipal corporations and counties may be estopped by laches.[17] The plea of the statute of limitations is in substantially the same form as a similar plea in an action at law, but no special form is essential.[18] If the bill charge fraud or other matters, which, if true, would prevent the statute from depriving the complainant of relief, the plea must deny them.[19] It is not sufficient to deny them in an answer in support of the plea.[20] The statute of frauds will be followed by the Federal courts.[21] If the bill shows that the complainant's case is re-

[7] Brown v. County of Buena Vista, 95 U. S. 157, 161.

[8] Buxton v. James, 5 De Gex & Sm. 80, 84; Rumford Chem. Works v. Vice, 14 Blatchf. 179, 180; Green v. Barney, 19 Fed. R. 420; People v. Cooper, 22 Hun (29 N. Y. S. C. R.), 515, 517. See Illinois G. T. Ry. Co. v. Wade, 140 U. S. 65.

[9] U. S. v. Beebe, 127 U. S. 338; U. S. v. Insley, 130 U. S. 263; U. S. v. Dalles M. L. Co., 140 U. S. 599.

[10] Gibson v. Chouteau, 13 Wall. 92; U. S. v. Thompson, 98 U. S. 486.

[11] U. S. v. Thompson, 98 U. S. 486, 490; *supra*, § 8.

[12] Stanley v. Schmally, 147 U. S. 508, 517.

[13] Stanley v. Schmally, 147 U. S. 508, 518.

[14] Edison El. Light Co. v. Equitable Life Assur. Soc. of U. S., 55 Fed. 478.

[15] Sage v. Winona & St. P. R. Co., 58 Fed. R. 297.

[16] Cressy v. Meyer, 138 U. S. 525.

[17] Boone County v. Burlington & M. R. R. Co., 139 U. S. 684.

[18] Harpending v. Reformed Prot. Ch., 16 Pet. 455; West Portland H. Ass'n v. Lownsdale, 17 Fed. R. 205; Story's Eq. Pl., § 752.

[19] Stearns v. Page, 1 Story, 204.

[20] Ibid.

[21] Randall v. Howard, 2 Black, 585, 589.

pugnant to the statute of frauds, it is demurrable.[22] This, however, is rarely the case, and the statute is usually referred to by plea or answer.[23] The rule is thus stated by Lord Chancellor Cranworth: "It was argued that the statute of frauds was not open to the defendant, by reason of his not having insisted upon the statute as a defense; but this is a mistake. Where a defendant admits the agreement, if he intends to rely on the fact of its not being in writing and signed, and so being invalid by reason of the statute, he must say so; otherwise he is taken to mean that the admitted agreement was a written agreement good under the statute, or else that on some other ground it is binding on him; but where he denies or does not admit the agreement, the burden of proof is altogether upon the plaintiff, who must then prove a valid agreement capable of being enforced."[24] The facts which show that the statute applies must be stated specifically.[25] Otherwise the plea is bad.[26] An act of Congress ratifying the construction of an otherwise illegal structure will, if constitutional, abate a suit for an injunction against the further maintenance of the structure, although not set up by plea, answer, or demurrer.[27]

§ 132. Pleas of matter of record.— A plea founded upon matter of record sets up the judgment or decree of a court of record upon the same matter and between the same parties, or those in privity with them, in a cause of which it had jurisdiction. Pleas of matter of record are in some of the books distinguished from pleas of matter as of record. This distinction was due to the fact that, in England, the Court of Chancery in its equitable jurisdiction, the Court of Admiralty and ecclesiastical courts were deemed courts not of record, although their decrees had the same effect[1] as the judgments of courts of record. It has been held that the judgment of a court of an Indian nation in the Indian Territory has the same force as the judgment of a State court.[2] A judgment of an

[22] Ibid.

[23] For an illustration of the plea, see Jackson v. Oglander, 2 H. & M. 465.

[24] Ridgway v. Wharton, 3 De G., M. & G. 677, 689. But see Heys v. Astley, 9 Law Times (N. S.), 356.

[25] Bailey v. Wright, 2 Bond, 181; McCloskey v. Barr, 38 Fed. R. 165, 169.

[26] Ibid.

[27] The Clinton Bridge, 10 Wall. 454. But see Griffing v. Gibb, 2 Black, 519; Liverpool, N. Y. & P. S. S. Co. v. Com'rs of Emigration, 113 U. S. 33, 38.

§ 132. [1] Story's Eq. Pl., § 778.

[2] Stoudley v. Roberts, 59 Fed. R. 836.

alien court, with jurisdiction of the subject-matter and of the parties, in which the defendant was duly served or voluntarily appeared in a country, such as England and Canada, the laws of which give like effect to a judgment of a court in the United States, is, in the absence of fraud, conclusive, between the parties and their privies, as to all matter pleaded and which might have been tried in the case.[3] A foreign judgment *in rem* adjudicating the title to land or to a ship or to other movable property within the custody of the court, is, in the absence of extraordinary circumstances,[4] conclusive, and will not be re-examined.[5] A foreign judgment determining the status of persons subject to the jurisdiction, such as a decree confirming a marriage or granting a divorce, is followed unless contrary to the policy of the law of this country.[6] A foreign judgment under which a person has been compelled to pay money is said to be so far conclusive that the justice of the payment cannot be impeached in another country, and that the defendant cannot be compelled to pay it again.[7] So, it has been held, are foreign judgments discharging obligations between citizens or residents of the foreign country and therein contracted.[8] But it was held by a majority of the Supreme Court that, otherwise, the judgment *in personam* of a court in a foreign country where a similar judgment of a court of this country would be considered as only *prima facie* evidence of the facts therein adjudicated, when one of the parties is an American citizen and the other a citizen of that foreign country, is only *prima facie* evidence and not conclusive.[9] A decree or judgment of a State court between the same parties in a suit duly commenced before that in a Federal court is *res adjudicata* in the latter,[10] although the question was one of general commer-

[3] Ritchie v. McMullen, 159 U. S. 235.

[4] See Windsor v. McVeigh, 93 U. S. 274.

[5] Williams v. Armroyd, 7 Cranch, 423, 432; Hudson v. Guestier, 4 Cranch, 434; Hilton v. Guyot, 159 U. S. 113, 167.

[6] Cheely v. Clayton, 110 U. S. 701; Hilton v. Guyot, 159 U. S. 113, 167.

[7] Hilton v. Guyot, 159 U. S. 113, 168, per Gray, J., citing Gold v. Canham, 2 Swanst. 325; s. c., 1 Cases in Ch. 316; Tarleton v. Tarleton, 4 M. & S. 20; Konitzky v. Meyer, 49 N. Y. 571.

[8] Burrows v. Jamereaux or Jamineau, Mosely, 1; s. c., 2 Stra. 733; s. c., 2 Eq. Cas. Abr. 525, pl. 7; s. c., 12 Vin. Abr. 87, pl. 9; s. c., Sel. Cas. in Ch. 69; s. c., 1 Dick. 45; May v. Breed, 7 Cush. (Mass.) 15; Hilton v. Guyot, 159 U. S. 113, 168.

[9] Hilton v. Guyot, 159 U. S. 113.

[10] Clay v. Deskins (C. C. A.), 63 Fed. R. 330.

cial law and jurisprudence and the case was decided upon a demurrer;[11] but not, it has been held, an order, judgment or decree of a State court in a suit instituted subsequent to the beginning of that in a court of the United States.[12] Where the suit was first instituted the decree therein is conclusive although not entered until after the pendency of that in which it is pleaded or offered in evidence.[13] A decree of a court of equity will not be a bar if it resulted in the dismissal of a bill without prejudice;[14] or for want of prosecution;[15] or for a slip in practice;[16] or by consent before a hearing,[17] at least when it does not provide that each party shall pay his own costs; or, by the former English practice, if it had not been signed and enrolled, although it could then be insisted on by answer as a good defense.[18] A nonsuit, whether involuntary,[19] or even when taken after the highest court of the State had decided that the plaintiff had no cause of action, is not conclusive in a subsequent action upon the same facts.[20] Nor does a judgment against the plaintiff upon his default have that effect.[21] But a decree upon a bill taken as confessed concludes the defendant in another suit.[22] A decree sustaining a demurrer to a bill is a bar to a subsequent bill between the same parties involving the same subject-matter unless the bill is dis-

[11] Fuller v. Hamilton County, 53 Fed. R. 411.

[12] Blydenstein v. N. Y. S. & Tr. Co., 59 Fed. R. 12; Sharon v. Terry, 36 Fed. R. 337; *supra*, §§ 9, 10. But see Insurance Co. v. Harris, 97 U. S. 331.

[13] David Bradley Mfg. Co. v. Eagle Mfg. Co. (C. C. A.), 57 Fed. R. 980; s. c., 58 Fed. R. 721.

[14] Durant v. Essex Co., 7 Wall. 107; House v. Mullen, 22 Wall. 42, 46; Northern Pac. Ry. Co. v. St. Paul, M. & M. Ry. Co., 47 Fed. R. 536; *infra*, § 600.

[15] American D. R. B. Co. v. Sheldon, 17 Blatchf. 208; s. c., 4 Bann. & A. 551; Keller v. Stolzenbach, 20 Fed. R. 47; Conn v. Penn, 5 Wheat. 424, 427; Badger v. Badger, 1 Cliff. 241.

[16] Durant v. Essex Co., 7 Wall. 107, 109; House v. Mullen, 22 Wall. 42, 46; Walden v. Bodley, 14 Pet. 158; Gist v. Davis, 2 Hill Ch. (S. C.) 335; Grubb v. Clayton, 2 Hayw. (N. C.) 378; Hughes v. U. S., 4 Wall. 252. See, however, Starr v. Stark, 1 Saw. 270; Anon., 3 Atk. 809; Story's Eq. Pl., § 790.

[17] Marshall v. Otto, 59 Fed. R. 249.

[18] Anon., 3 Atk. 809; Story's Eq. Pl., § 790.

[19] Homer v. Brown, 16 How. 354.

[20] Gardner v. Michigan Cent. R. Co., 150 U. S. 349.

[21] Gabrielson v. Waydell, 67 Fed. R. 342.

[22] Last Chance Min. Co. v. Tyler Min. Co., 157 U. S. 683; Reedy v. Western El. Co. (C. C. A.), 83 Fed. R. 709; Thompson v. Wooster, 114 U. S. 104, 111, 112; Ogilvie v. Herne, 13 Ves. 563.

missed without prejudice;[23] and a decree overruling a demurrer operates as an estoppel upon the defendant.[24] In the absence of statutory authority, a decree of a court of equity is void which declares to be invalid a conveyance of land beyond its jurisdiction, but does not direct a reconveyance; and such a decree does not bind a court within the jurisdiction of which such land is situated.[25] So, it has been held, is a decree foreclosing a mortgage upon and selling property beyond the territorial jurisdiction, unless it compels the mortgagor or the trustee of the mortgage to execute a conveyance to the purchaser.[26] No judgment or decree rendered after a proceeding not *in rem*, in which the defendant therein was not served with process within the jurisdiction;[27] or in which the unsuccessful party was denied a hearing;[28] or some such other gross injustice was perpetrated as to render the so-called judicial proceeding not due process of law,— is of any effect. Judgments or decrees obtained by fraud are not conclusive when properly impeached,[29] but it has been held that they cannot be attacked collaterally.[30] A judgment of a court of the United States cannot be attacked collaterally because the record does not show the necessary difference of citizenship of the parties or that a Federal question was involved.[31]

In general, a decree which is interlocutory is not a bar, for, until the final decree in the cause, it is subject to revision by

[23] Messinger v. New Eng. M. L. I. Co., 59 Fed. R. 416.

[24] Fuller v. Hamilton Co., 53 Fed. R. 411.

[25] Carpenter v. Strange, 141 U. S. 87.

[26] Lynde v. Columbus, C. & K. Ry. Co., 57 Fed. R. 993; Farmers' L. & Tr. Co. v. Postal Tel. Co., 55 Conn. 334; s. c., 11 Am. R. 184; Mercantile Tr. Co. v. Kanawha & O. Ry. Co., 39 Fed. R. 337. But see Muller v. Dows, 94 U. S. 444.

[27] Pennoyer v. Neff, 95 U. S. 714; Life Ins. Co. v. Bangs, 103 U. S. 780; St. Clair v. Cox, 106 U. S. 350. As to decrees *in rem*, see The James G. Swan, 106 Fed. R. 94.

[28] Bischoff v. Wethered, 9 Wall. 812; Windsor v. McVeigh, 93 U. S. 274; Bradstreet v. Neptune Ins. Co., 3 Sum. 601. See Hilton v. Guyot, 159 U. S. 113, 204, 205.

[29] Pac. R. Co. of Mo. v. Mo. Pac. Ry. Co., 111 U. S. 505.

[30] Peninsular Iron Co. v. Eels, 68 Fed. R. 24, 35, 36; Christmas v. Russell, 5 Wall. 290, 305; Maxwell v. Stewart, 22 Wall. 77, 81.

[31] Kempe's Lessee v. Kennedy, 5 Cranch, 173, 185; Skillern's Ex'rs v. May's Ex'rs, 6 Cranch, 267; Cameron v. McRoberts, 3 Wheat. 591; Des Moines Nav. Co. v. Iowa H. Co., 123 U. S. 552, 557, 559; Dowell v. Applegate, 152 U. S. 327, 337-341; Pullman's P. C. Co. v. Washburn, 66 Fed. R. 790.

the court which entered it;[32] but in certain cases, orders which finally determine the right of parties, such as an order of interpleader, are conclusive in subsequent suits.[33] Where several suits ancillary to each other were brought in different districts, it was said that the validity of a decree in one district could not be questioned by the same parties in the ancillary suit in another district.[34] A judgment of acquittal upon an indictment is a bar to a suit by the United States to recover a penalty for the same offense,[35] but not to a civil suit to recover damages upon a charge of the same facts.[36] Where the parties and the property in dispute are the same and the plaintiff claims the same right as in the former suit, the prior adjudication is conclusive both as to all questions which were actually decided and as to all which might have been considered.[37] But where there is a different matter in dispute, the former judgment is only conclusive of the matters which were actually decided.[38]

[32] David Bradley Mfg. Co. v. Eagle Mfg. Co., 58 Fed. R. 721; *infra*, § 318.

[33] Insurance Co. v. Harris, 97 U. S. 331.

[34] Compton v. Jesups, 68 Fed. R. 263, 282, per Taft, J. But see s. c., 167 U. S. 1.

[35] Coffey v. U. S., 116 U. S. 442. *Cf.* U. S. v. Oregon C. Co., 103 Fed. R. 549.

[36] Stone v. U. S., 167 U. S. 178.

[37] M'Aleer v. Lewis, 75 Fed. R. 734; Nesbitt v. Riverside Ind. Dist., 144 U. S. 610; Wilmington & W. R. Co. v. Alsbrook, 146 U. S. 279; Dowell v. Applegate, 152 U. S. 327; Cromwell v. County of Sac, 94 U. S. 351; Jaros H. U. W. Co. v. Fleece H. U. W. Co., 65 Fed. R. 424; Bissell v. Spring Valley Tp., 124 U. S. 225.

[38] Last Chance Min. Co. v. Tyler Min. Co., 157 U. S. 683; Cromwell v. County of Sac, 94 U. S. 351. Thus, where a controversy has arisen between the lessor and the lessee of certain cars, as to the right of ownership and possession thereof upon the termination of a sublease, and a suit to which the lessor, lessee and sublessee were parties has been brought to determine their rights, in which it was adjudged that the lessor owned and had the right of possession of the cars, and compensation for storage of them after the end of his lease was awarded to the sublessee; it was held that the decree was *res adjudicata* as to the lessee's right to recover damages from the sublessee for the detention of the cars after the end of the sublease. O'Hara v. Mobile & O. R. Co., 75 Fed. R. 130. But see Chicago, R. I. & P. Ry. Co. v. St. Joseph Depot Co., 92 Fed. R. 22. Where, in a suit upon coupons, they and the bonds from which they were cut were adjudged to be invalid, the adjudication bound the plaintiff in a subsequent suit upon coupons from the same bonds which fell due later. Bissell v. Spring Valley Tp., 124 U. S. 225. A decision, that a tax for one year was void because the property taxed was exempt, was held to be conclusive as to the exemption of the property when taxed for another year. New Orleans v. Citizens' Bank, 167 U. S. 371; Goodenow v. Litchfield, 59 Iowa, 226. But see Keokuk & W. R. Co. v. Missouri, 152 U. S. 301, 315; Davenport v. Chicago, R. I. & P. R.

The fact that the first judgment or decree in the matter in dispute was too small to permit its review by an appellate court does not prevent it from being a bar to a subsequent suit which

Co., 38 Iowa, 638; Memphis City Bank v. Tennessee, 161 U. S. 186. *Cf.* Baldwin v. Maryland, 179 U. S. 220. For a case where a prior decree was held to conclusively establish the sufficiency of maps filed by a railway company, see So. Pac. R. Co. v. U. S., 168 U. S. 1. For a case where a decree declaring stock to be invalid was said to substantially establish the invalidity of the claim to pay which the stock was issued, see Townsend v. St. L. & S. C. & Min. Co., 159 U. S. 21. Questions decided upon the issue of a mandamus to compel the payment of judgments were held to be *res adjudicata* upon an application to enforce a later judgment so far as concerned the balances of the former judgments therein included, but not as to the other claims on the same. Police Jury of Jefferson County v. U. S. ex rel. Fisk, 60 Fed. R. 249. As to the effect of a decree or order dismissing a petition of intervention, see Manhattan Tr. Co. v. Sioux City & N. R. Co., 102 Fed. R. 710; *infra*, § 201.

A decree of a court of equity dismissing a bill to remove a cloud on title is not so far *res adjudicata* as to prevent the plaintiff from succeeding in a subsequent action of ejectment against the same defendant, although the court of equity in its opinion stated that the title of plaintiff was bad. Phelps v. Harris, 101 U. S. 370. But see State v. Buller, 47 Fed. R. 415. Where, on the reversal of a foreclosure decree, after a sale thereunder, the court below, in its action upon the mandate, although it reversed the decree in part, confirmed the sale; it was held that the failure of the mortgagor to appeal from said confirmation rendered it *res adjudicata* so that another suit to set it aside could not be maintained. Grape Creek C. Co. v. Farmers' L. & T. Co. (C. C. A.), 80 Fed. R. 200. A decree in a suit to enjoin the infringement of a patent which declared that the same was valid was held to bind upon this question the same defendant in a second suit to enjoin similar infringements, although the only issue raised by the pleadings in the former suit related to the title. Empire S. N. Co. v. American S. L. B. Co. (C. C. A.), 74 Fed. R. 864. But where apparently there was no such finding in the first decree, and the only question then litigated had been the defendants' claim of a license, it was held that it was not estopped from contesting the validity of the patent in a second suit. Lublin v. Stewart H. & M. Co., 75 Fed. R. 294. A judgment in an action for royalties is an estoppel against the same defendant in a suit for royalties accruing subsequently, when he pleads a defense different from that set up in the first suit. Johnson Co. v. Wharton, 152 U. S. 252. A decree for a perpetual injunction and for damages and profits in a patent case is an estoppel against a second suit for damages and profits on account of infringements committed during the period covered by the first suit of which no evidence was given nor recovery prayed. Horton v. N. Y. C. & H. R. R. Co., 63 Fed. R. 897. But it does not prevent a second perpetual injunction against the same acts to support a decree for an accounting of profits caused by infringements subsequent to the first suit. Ibid. In the courts of the United States a judgment for the damages caused by a nuisance such as the excessive use of a street by a railroad company does not bar

can be brought up by appeal or error.[39] If, upon the face of the record, anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence.[40] A judgment or decree is binding upon both parties and those in privity with them. Privies are all who have acquired the property in dispute after the judgment or decree,[41] or pending the suit,[42] provided, in the latter case at least, that compliance was made with the necessary statutory requirements.[43] In

a subsequent action for a continuance of the same nuisance. Baltimore & P. R. Co. v. Fifth Baptist Church, 137 U. S. 568. But where a street has been permanently occupied by a railroad company without compensation to the owner, all the damage thereby caused must be recovered in a single action. Shepherd v. Baltimore & O. R. Co., 130 U. S. 426.

[39] Johnson Co. v. Wharton, 152 U. S. 252. As to the effect of an appeal, see Eastern B. & L. Ass'n v. Welling, 103 Fed. R. 852.

[40] Russell v. Place, 94 U. S. 606, 610; McCarty v. Lehigh Valley R. Co., 160 U. S. 110, 120.

[41] Moor v. Welsh Copper Co., 1 Eq. Cas. Abr. 89.

[42] Ibid.

[43] Jones v. Smith, 40 Fed. R. 814; *infra*, § 375. Thus, a grantee of a mortgage is bound by judgments against the mortgagor entered before the mortgage or in suits pending when the mortgage was made. Keokuk & Western R. Co. v. Missouri, 152 U. S. 301, 314. But not by judgments subsequently entered to which he was not a party. Dull v. Blackman, 169 U. S. 243; Keokuk & Western R. Co. v. Missouri, 152 U. S. 301, 314; Campbell v. Hall, 16 N. Y. 575; Southern B. & Tr. Co. v. Folsom (C. C. A.), 75 Fed. R. 929. So the beneficiary of a trust is bound by a judgment against his trustee. Kent v. Lake Superior S. C. Co., 144 U. S. 75; Rejall v. Greenhood, 92 Fed. R. 945. For the exceptions, see Goff v. Kelly, 74 Fed. R. 827; *supra*, § 45. A Federal court followed a California statute and the construction of the same by the State courts, so far as to hold that a foreclosure decree of a State court against an administrator of the mortgagor was binding upon the latter's heirs, without determining whether, if the foreclosure had been instituted in the Federal court, the heirs would have been necessary parties. *Cf.* Norton v. House of Mercy (C. C. A.), 101 Fed. R. 882; Hearfield v. Bridges (C. C. A.), 75 Fed. R. 47. But a decree against the trustee of a mortgage does not affect the same person when claiming as trustee of another mortgage without proof that the bondholders are the same. Compton v. Jesup (C. C. A.), 68 Fed. R. 47. *Cf.* Carey v. Roosevelt (C. C. A.), 102 Fed. R. 569.

It has been held that stockholders who are not parties to statutory proceedings for the dissolution of a corporation are bound by a decree therein making assessments upon the stock, so that they cannot dispute the insolvency of the company and the necessity of the assessment (Hawkins v. Glenn, 131 U. S. 319; s. c., 135 U. S. 533), but that they may defend upon the ground that their shares were fully paid, or as to any other question peculiarly affecting their individual liability. Rood v. Whorton, 67 Fed. R. 434. That stockhold-

certain cases, persons not parties nor their privies have been held to be bound by [44] and to have the benefit of decrees as estoppels when they defended the suit openly to the knowledge of the adverse party and for the protection of their own interests.[45] The secret payment of the expenses of the defense,[46] or the public filing of a brief upon an appeal [47] in the first suit, is insufficient.

It has been said that a decree in a suit brought by one on behalf of a class binds the rest of the class, even those who do not come in or contribute to the suit.[48] In pleading a judgment or decree, it is not necessary to set it forth, or the proceedings upon which it was founded, at length; [49] but so much of the decree and pleadings should be set forth as will show that the same point was then in issue.[50] And the court may re-

ers are not bound by a judgment against their corporation in a suit which was brought after the proceedings to liquidate its assets had begun. Schrader v. Manufacturers' Nat. Bank, 133 U. S. 67. *Cf.* Ward v. Joslin (C. C. A.), 105 Fed. R. 224. And that a judgment establishing the exemption of a bank from taxation of its property and from liability to pay a tax upon its stockholders is not an estoppel against the enforcement of a tax directly against the latter. New Orleans v. Citizens' Bank, 167 U. S. 371, 380, 402. A judgment against the husband concerning the title to property claimed to be community property was held to estop him and his wife in a subsequent suit. Lichty v. Lewis, 63 Fed. R. 535. A State is not bound by a judgment against one of its officers for the possession of land which he claims to hold in its behalf. Tindal v. Wesley, 167 U. S. 204. See *supra*, § 37. A judgment against a municipal officer binds his successors in office, the municipality and the other officers so far as their official obligations are concerned. New Orleans v. Citizens' Bank, 167 U. S. 371, 389; Scotland County v. Hill, 112 U. S. 183; Harshman v. Knox Co., 122 U. S. 306; State v. Rainey, 74 Mo. 229; Harmon v. Auditor, 123 Ill. 122. The same effect is given to an order for a mandamus, Police Jury v. U. S., 60 Fed. R. 249; Ransom v. Pierre (C. C. A.), 101 Fed. R. 665; McEvoy v. New York, 56 App. Div. 222; or for a writ of prohibition. Bank of Ky. v. Stone (C. C. A.), 88 Fed. R. 383, 395, 398.

[44] Plumb v. Crane, 123 U. S. 560; Bank of Ky. v. Stone, 88 Fed. R. 383, 396.

[45] Cramer v. Singer Mfg. Co., 93 Fed. R. 636.

[46] Cramer v. Singer Mfg. Co., 93 Fed. R. 636; Litchfield v. Goodnow, 123 U. S. 549.

[47] Stryker v. Goodnow, 123 U. S. 527.

[48] Gamble v. San Diego, 79 Fed. R. 487, 500. But see Compton v. Jesup, 167 U. S. 1, 20, 36; s. c. in C. C. A., 68 Fed. R. 263; *supra*, §§ 48, 49.

[49] Ricardo v. Garcias, 12 Cl. & F. 368; Story's Eq. Pl., § 783.

[50] Garcias v. Ricardo, 14 Sim. 265; Story's Eq. Pl., § 791; Emma S. M. Co. v. Emma S. M. Co. of N. Y., 1 Fed. R. 39. See Jonathan M. M. Co. v. Whitehurst, 65 Fed. R. 996.

quire that the decree be pleaded at length,[51] or, if the plea sets up matter of record in the same court, that the record be shown before the plaintiff is required to take action upon the plea.[52] Where a decree in a former suit is introduced in evidence on stipulation without the objection that it has not been properly pleaded, it will be given full effect as a bar although not properly pleaded.[53] It has been said that by pleading a defense against a former decree a party waives his right to claim an estoppel under the same;[54] and that the opinion cannot be introduced as evidence to show what issues were tried when the decree was rendered.[55] But offering evidence of such facts while the former decree was merely interlocutory does not waive the right to claim that it is a bar after it has ripened into a final decree.[56] A prior decree can usually be put in evidence without having been pleaded where the pleading of the party sets up the facts which were adjudicated by the decree; and the decree is then conclusive evidence of such facts.[57]

§ 133. Pleas of matter in pais.— Pleas founded upon matter *in pais* state some other reason, for example, a release, or an account stated, or a purchase without notice for a valuable consideration, why the plaintiff should not have relief.[1] A plea of purchase without notice for a valuable consideration should deny notice positively, and should state the amount of the consideration.[2] It is insufficient to plead that the defendant paid a "good and valuable consideration, to-wit, a certain sum of money."[3] A plea to a bill for an injunction to restrain the infringement of a reissued patent, which set up that the claim had been unlawfully expanded so as to embrace subsequent improvements covered by later patents, was held good.[4] A plea to a bill filed under section 4918 of the Revised Statutes against the owner of a patent interfering with that of the complainant, which set up that the invention described in the complainant's

[51] Emma S. M. Co. v. Emma S. M. Co. of N. Y., 1 Fed. R. 89.

[52] Ibid.

[53] David Bradley Mfg. Co. v. Eagle Mfg. Co., 58 Fed. R. 721.

[54] Mack v. Levy, 60 Fed. R. 751.

[55] Ibid.

[56] David Bradley Mfg. Co. v. Eagle Mfg. Co., 57 Fed. R. 980.

[57] Southern Pac. R. Co. v. U. S., 168 U. S. 1, 57.

§ 133. [1] Story's Eq. Pl., §§ 795–815.

[2] Wood v. Mann, 1 Sumn. 506.

[3] Secombe v. Campbell, 18 Blatchf. 108.

[4] Hubbell v. De Land, 14 Fed. R. 471.

patent was described in a previous English patent published in the United States, and filed in the Patent Office here before the issue of the complainant's patent, was held bad and overruled.[5]

§ 134. Pleas to the discovery.— Pleas to the discovery set up new matter, showing (1) that the plaintiff's case is not such as entitles a court of equity to assume jurisdiction to compel a discovery in his favor; (2) that the plaintiff has no such interest in the subject-matter of the action as entitles him to call upon the defendant for a discovery; (3) that the defendant has no such interest in the subject-matter of the action as will entitle the plaintiff to call upon him for a discovery; (4) that the situation of the defendant renders it improper for a court of equity to compel him to make a discovery.[1] Of them, Professor Langdell says: "But it should be added that, while demurrers to discovery are common, there are few instances of pleas of that kind; and the cases are few in which it would be advisable to resort to such a plea, since the question can be raised equally well by answer, and then the defendant's own statement of the facts will be equally conclusive."[2]

§ 135. When a plea must be filed.— Unless the defendant's time has been enlarged, for cause shown, by a judge of the court, upon motion for that purpose, the plea should be filed on the rule-day next succeeding that of entering the defendant's appearance.[1]

§ 136. Frame of a plea.— A plea is entitled in the cause, and is headed as follows: "The plea of the above-named defendant (or, of A. B., one of the above-named defendants) to the bill of complaint of the above-named plaintiff (or plaintiffs)." When put in by more than one defendant, the heading runs as follows: "The joint and several plea of the above-named defendants (or of A. B. and C. D., two of the above-named defendants);"[1] but if filed by husband and wife in the wife's interest only, the words "and several" should be omitted; though their use, being mere surplusage, will not vitiate the plea.[2] The title of the plea should agree with that of the

[5] Pentlarge v. Pentlarge, 19 Fed. R. 817; s. c., 23 Fed. R. 412. But see Foster v. Lindsay, 3 Dill. 126, 131.

§ 134. [1] Mitford's Pl., ch. 2, § 2, part 2.

[2] Langdell's Eq. Pl., § 148.

§ 135. [1] Rule 18.

§ 136. [1] Daniell's Ch. Pr. (5th Am. ed.) 681.

[2] Fitch v. Chapman, 2 Sim. & S. 31.

cause as stated in the bill. Any corrections which are desired to be made must be put in the heading, thus: "The plea of the above-named defendant, John Aber (in the bill, by mistake called Henry Aber);" or, "The plea of Henry Curtis and Mary his wife, lately, and in the bill called Mary Robinson, spinster" (or widow, as the case may be).[3] When accompanied by an answer or demurrer, it should be headed: "The plea and answer;" or "The joint," or "joint and several plea and answer;" or "The joint and several plea, answer, and demurrer," etc., according to the circumstances.[4] Like a demurrer, it is usually, but not necessarily, introduced by a useless protestation against the confession of the truth of any matter contained in the bill.[5] After the protestation, the defendant should state in the plea the extent to which it goes; as whether it is to the whole bill, or to part only, and in the latter case the part to which it is intended to apply.[6] Next should come the substance of the plea together with such averments as are necessary to support it.[7] If these matters are within the defendant's knowledge he should state them positively.[8] Otherwise upon information and belief.[9] The allegations must be made with certainty and not by way of argument, inference, or conclusion.[10] The plea cannot properly allege and rely upon matters all of which are apparent upon the face of the bill.[11] "The conclusion of the plea is usually a repetition that the

[3] Daniell's Ch. Pr. (5th Am. ed.) 681, 682.

[4] Daniell's Ch. Pr. (5th Am. ed.) 682.

[5] Daniell's Ch. Pr. (5th Am. ed.) 682; Story's Eq. Pl., § 694.

[6] Mitford's Pl., ch. 2, § 2, part 2; Story's Eq. Pl., § 694.

[7] Mitford's Pl., ch. 2, § 2, part 2; Story's Eq. Pl., § 694.

[8] Foster v. Vassall, 3 Atk. 587; Boone v. Chiles, 10 Pet. 176, 210–213; Story's Eq. Pl., § 662.

[9] Bolton v. Gardner, 3 Paige (N. Y.), 273; Story's Eq. Pl., § 662.

[10] Emma S. M. Co. v. Emma S. M. Co. of N. Y., 1 Fed. R. 39; Nabob of Arcot v. East India Co., 3 Brown, Ch. C. 292; Hudson v. Randolph (C. C. A.), 66 Fed. R. 216; Caesar v. Capell, 83 Fed. R. 403; *supra*, § 24; Story's Eq. Pl., § 662. A plea was held bad which merely alleged that the complainants, before procuring the patent which they sued to protect, "became and were fully advised" that the alleged inventor "could not carry the date of his invention further back than the month of June, 1886," and that an examiner in the patent office had found, "as was the fact," that the invention had been described in previous publications; since a traverse would only deny that complainants were advised, and that the examiner found, etc. Westinghouse El. S. Mfg. Co. v. Stanley, 65 Fed. R. 821.

[11] Billing v. Flight, 1 Madd. 230; Story's Eq. Pl., § 660.

matters so offered are relied upon as an objection to the jurisdiction, or to the person of the plaintiff or defendant, or to the frame of the bill and suit, or in bar of the suit; praying the judgment of the court, whether the defendant ought to be compelled to make any further or other answer to the bill, or so much thereof as the plea extends.[12] It does not appear that any particular form of conclusion is necessary to a plea in equity.[13] Every plea must be supported by a certificate of counsel, that in his opinion it is well founded in point of law, and by the affidavit of the defendant, that it is not interposed for delay, and that it is true in point of fact.[14] When the facts alleged in the plea are within the defendant's knowledge, he must swear to them positively. Otherwise, upon information and belief.[15] Whether the certificate of counsel is required when the defendant defends in person has never been decided.[16] If the affidavit or certificate are omitted, the former remedy was a motion to take the paper purporting to be a plea off the file;[17] but, according to the language of an opinion of the Supreme Court, the plea might then be disregarded.[18] By setting down the plea for argument, such a defect is waived.[19] Like all other proceedings in equity, a plea must contain no scandalous or impertinent matter. If it does, the same proceedings may be taken upon it as when scandal or impertinence is contained in an answer.[20] Only one plea can be filed unless by special leave of the court.[21]

§ 137. Answers with pleas.— Although the purpose of a plea is usually to avoid discovery, yet in certain cases it must be accompanied by an answer. If the plea be to a part only

[12] Story's Eq. Pl., § 694; Mitford's Pl., ch. 2, § 2, part 2.

[13] Daniell's Ch. Pr. (5th Am. ed.) 688.

[14] Equity Rule 31. The seal of a corporate defendant is not required. Fayerweather v. Hamilton College, 103 Fed. R. 546.

[15] Ewing v. Blight, 3 Wall. Jr. 134.

[16] See U. S. R. S., § 747; 1 Hoffman's Ch. Pr. 97; Daniell's Ch. Pr. (5th Am. ed.) 311, note 7.

[17] Ewing v. Blight, 3 Wall. Jr. 134.

[18] National Bank v. Insurance Co., 104 U. S. 54; *supra*, § 111.

[19] Goodyear v. Toby, 6 Blatchf. 130; Griswold v. Bacheller, 77 Fed. R. 857.

[20] Daniell's Ch. Pr. (2d Am. ed.) 686. See Dixon v. Olmius, 1 Cox, Eq. 412; *infra*, § 141.

[21] Wheeler v. McCormick, 8 Blatchf. 267; Lamb v. Starr, Deady, 351; Noyes v. Willard, 1 Woods, 187; Reissner v. Anness, 12 Off. Gaz. 842; s. c., 3 Bann & A. 148. See Elgin W. P. & W. P. Co. v. Nichols, 65 Fed. R. 215, 216; *supra*, § 124.

of the bill, it must ordinarily be accompanied by an answer or demurrer to the residue.[1] The equity rules provide that "In every case where the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea and explicitly denying the fraud and combination, and the facts on which the charge is founded."[2] It seems that this only applies when discovery concerning the fraud or combination is prayed for.[3] Negative and anomalous pleas must usually be accompanied by an answer giving the discovery required by the bill.[4] This subject is now of comparatively little importance, as the objections raised by such pleas can now be taken by answer[5] with more safety and convenience. The clearest statement and explanation of the rule with which the writer is acquainted, is that by Professor Langdell. "If the defense which is set up by a plea has been anticipated by the bill, and evidence has been charged in disproof of the defense, the defendant must answer such charges of evidence, notwithstanding his plea, for an answer to that extent will be needed in trying the truth of the plea. The defendant, therefore, incorporates an answer with his plea; and then the answer is said to support the plea. Such an answer, it will be observed, contains discovery only, and it is called an answer in support of a plea, to distinguish it from the case where a defendant *defends* by answer as to part of the bill, and by plea as to part."[6] "If a bill anticipates a defense, and, without admitting its truth, replies to it affirmatively, and the defendant wishes to set up the defense by plea, it is obvious that he must traverse the anticipatory replication; for otherwise,

§ 137. [1] Equity Rules 18, 32; Langdell's Eq. Pl., § 99; Ferguson v. O'Harra, Pet. C. C. 493.

[2] Equity Rule 32; Piatt v. Oliver, 1 McLean, 295; Lewis v. Baird, 3 McLean, 56; Bailey v. Wright, 2 Bond, 181.

[3] Hilton v. Guyott, 42 Fed. R. 249. Where to a bill for an accounting the defendant filed a plea in abatement which averred that the amount in dispute was less than $2,000, he was required to answer the interrogatories attached to the bill concerning the amounts which he had collected. Playford v. Lockard, 65 Fed. R. 870. But ordinarily an answer accompanying a plea is not subject to exceptions for insufficiency because it fails to answer interrogatories annexed to the bill. Hatch v. Bancroft-Thompson Co., 67 Fed. R. 802; *infra*, § 134.

[4] Dwight v. Central Vt. R. Co., 9 Fed. R. 785; Langdell's Eq. Pl., §§ 101–114.

[5] Equity Rule 39.

[6] Langdell's Eq. Pl., § 100.

in the event of issue being taken upon the truth of the plea, the affirmative replication will be admitted to be true. A negative rejoinder, therefore, must be incorporated with the affirmative plea. Such pleas have become common in modern times; and being partly affirmative and partly negative, they are distinguished by the name of anomalous pleas. If the defendant should not be prepared to deny the truth of the affirmative replication, and should wish to set up an affirmative answer to it, of course both branches of his plea should be affirmative; but no instance of such a plea has been found in the reported cases. If an anomalous plea be put in issue, it will be seen that each party has something to prove; namely, the defendant his affirmative defense, and the plaintiff his affirmative replication; and the plaintiff is, therefore, entitled to discovery as to the latter. Consequently, an anomalous plea must always be supported by an answer as to the allegations which constitute the replication, and as to all charges of evidence, if any, in support of such allegations."[7] Such an answer is usually prefaced by an averment that the defendant does not thereby waive his plea, but wholly relies thereon.[8] An answer to the whole bill, which extends to the whole of the matter covered by the plea, will overrule a plea in bar filed by the answering defendant.[9] "The rule that no plea is to be held bad only because the answer may extend to some part of the same matter as may be covered by the plea is not applicable where the answer extends to the whole of the matter covered by the plea."[10]

§ 138. Proceedings of the plaintiff when a plea is filed.— If the allegations in a plea are sufficient and true, but the plaintiff can produce new matter which will avoid its effect, he must amend his bill, introducing by way of pretense or otherwise a statement of the matters contained in the plea, and also a substantive allegation of the new matter by which

[7] Langdell's Eq. Pl., § 101. See also Langdell's Eq. Pl., §§ 102–114; Story's Eq. Pl., §§ 668–674; Foley v. Hill, 3 Myl. & Cr. 476.

[8] Story's Eq. Pl., § 695.

[9] Grant v. Phœnix L. Ins. Co., 121 U. S. 105, 115; Dakin v. Union Pac. Ry. Co., 5 Fed. R. 665; Crescent C. L. S. Co. v. Butchers' U. L. S. Co., 12 Fed. R. 225; Hudson v. Randolph (C. C. A.), 66 Fed. R. 216. But see Hayes v. Dayton, 8 Fed. R. 702, 706; Mercantile Tr. Co. v. M., K. & T. Ry. Co., 84 Fed. R. 379, 383.

[10] Grant v. Phœnix L. Ins. Co., 121 U. S. 105, 115; Huntington v. Laidley, 79 Fed. R. 865.

he avoids it.[1] In such a case, at common law or by the earlier chancery practice, he would reply by confession and avoidance; but special replications are no longer used in equity, their purpose being sufficiently answered by the practice of amendment.[2] Otherwise, the plaintiff may either move to take the plea off the file for irregularity,[3] or set down the plea to be argued,[4] or move for a reference to a master,[5] or take issue upon the plea.[6] If he neither amends nor takes any of these proceedings before the rule-day next after that on which the same was filed, he is deemed to admit the truth and sufficiency of the plea, and his bill will be dismissed as of course unless a judge of the court shall allow him further time for the purpose.[7] More indulgence in this respect will be allowed to States than to individuals,[8] and the plaintiff is not obliged to take notice of a plea until it has been entered in the order book or served upon him.[9] In case of a motion to take the plea off the file, it will be more prudent to obtain an extension of time wherein to reply or set down the plea, in case it should be allowed to remain.[10] No one, except the defendant who files a plea, can take advantage of the failure of the plaintiff to act upon it.[11] Where the plaintiff had taken no action upon the plea for eight months, it was held that the defendant might withdraw it and file an answer.[12] Otherwise, neither party is, in general, at liberty to take any step in a cause after the filing of a plea, until the plea is disposed of.[13] If the defendant pleads to the relief only, and proposes to answer the whole discovery required, the plaintiff may file exceptions to the answer.[14] This, it was formerly held, he could not do unless by special leave of the court, without thereby admitting the truth of a plea which extended to any

§ 138. [1] See *supra*, § 80; Southern Pacific R. Co. v. U. S., 168 U. S. 1, 55.

[2] Mason v. Hartford, P. & F. R. Co., 10 Fed. R. 834; Equity Rules 29, 66; Story's Eq. Pl., chs. xix, xx.

[3] Ewing v. Blight, 3 Wall. Jr. 184.

[4] Rule 33.

[5] Tarleton v. Barnes, 2 Keen, 632.

[6] Rule 33.

[7] Rule 38.

[8] Rhode Island v. Massachusetts, 14 Pet. 210.

[9] Newby v. Oregon Ry. Co., 1 Saw. 63, 65.

[10] See Rule 38.

[11] Chicago & Alton R. Co. v. Union R. M. Co., 109 U. S. 702, 717.

[12] Oliver v. Decatur, 4 Cranch C. C. 458.

[13] Daniell's Ch. Pr. (5th Am. ed.) 691; Buchanan v. Hodgson, 11 Beav. 368.

[14] Pigot v. Stace, 2 Dick. 496; Sidney v. Perry, 2 Dick. 602; Playford v. Lockard, 65 Fed. R. 870.

part of the discovery.[15] It has been held that in such a case the answer is not subject to exceptions for insufficiency because it does not answer specific interrogatories as to matters answered by the plea.[16] By filing exceptions to the sufficiency of an answer the plaintiff waives all objections to the plea.[17] In an extraordinary case, a motion for an injunction might be made while a plea was pending; but the more usual course is to pray the court to expedite the hearing of the plea.[18] When a plea and a demurrer were filed at the same time, it was held that action on the plea should be postponed till the hearing on the demurrer.[19]

§ 139. Motion to take a plea off the file.— A motion to take a plea off the file is, it seems, the proper remedy, when the plea was filed too late,[1] or has such an irregularity in form as the omission of the requisite affidavit and and certificate.[2] In a patent case, a plea which simply denied infringement was stricken from the files as improper in form.[3] But this is an improper method to test the sufficiency of a plea,[4] although when the sufficiency of the plea had been fully argued without raising this objection the court determined it upon such a motion.[5] When two pleas are filed without special leave, the defendant will be obliged to elect between them within ten days. Otherwise, both will be ordered to stand for an answer,[6] or possibly be stricken out.[7] Unless, however, an objection to such a defect is specifically made, it will be considered waived.[8]

§ 140. Argument of a plea.— "If the plaintiff conceives a plea to be defective in point of form or substance, he may take

[15] Darnell v. Reyny, 1 Vern. 344; Brownell v. Curtis, 10 Paige (N. Y.), 210.

[16] Hatch v. Bancroft-Thompson Co., 67 Fed. R. 802.

[17] Ibid.

[18] Ewing v. Blight, 3 Wall. Jr. 139; Humphreys v. Humphreys, 3 P. Wms. 395.

[19] Cambell v. Mayer, 33 Fed. R. 795.

§ 139. [1] McKewan v. Sanderson, L. R. 16 Eq. 316; Ewing v. Blight, 3 Wall. Jr. 134.

[2] Ewing v. Blight, 3 Wall. Jr. 134; Sharp v. Reissner, 20 Blatchf. 10, 13; Griswold v. Bacheller, 77 Fed. R. 857. But see National Bank v. Insurance Co., 104 U. S. 54, 76; Secor v. Singleton, 9 Fed. R. 809; s. c., 3 McCrary, 230.

[3] Sharp v. Reissner, 20 Blatchf. 10, 13; *supra*, § 124.

[4] Hatch v. Bancroft-Thompson Co., 67 Fed. R. 802, 804.

[5] Union S. S. Co. v. Phila. & R. R. Co., 69 Fed. R. 833.

[6] Reissner v. Anness, 12 Off. Gaz. 842; s. c., 3 Bann. & A. 148; Noyes v. Willard, 1 Woods, 187.

[7] Newby v. Oregon Central Ry. Co., 1 Saw. 63, 67.

[8] Sharon v. Hill, 22 Fed. R. 28.

the judgment of the court upon its sufficiency. And if the defendant is anxious to have the point determined, he may also take the same proceeding."[1] A plea is set down for argument in the same manner as is a demurrer, and the proceedings at the argument are also substantially the same. A plaintiff has been allowed, although the practice is irregular, to file a demurrer to a plea; in which case the demurrer presents the question of the sufficiency of the bill as well as the plea.[2] The sufficiency of the bill as to substance is also tested when the plea is set down for argument; but it has been said that the allegations therein are not taken so strictly against the complainant as in case of a demurrer.[3] It has been said that when a plea is set down for argument, the complainant cannot take any exception to its regularity or form.[4] For the purpose of the argument, all allegations in the plea which are not inconsistent with each other are presumed to be true.[5] If a document is referred to in the plea and annexed thereto, its language will control the description of it set forth in the body of the plea;[6] but it has been held that this rule does not apply to a case where a judgment is annexed to an answer filed in addition to the plea.[7] Upon argument, a plea may be allowed, or the benefit thereof may be reserved to the hearing, or it may be ordered to stand for an answer, or it may be overruled.[8] "In the first case the plea is determined to be a full bar to so much of the bill as it covers, if the matter pleaded, with the

§ 140. [1] Mitford's Pl., ch. 2, § 2, part 2.

[2] Beard v. Bowler, 2 Bond, 13; Goodyear v. Toby, 8 Blatchf. 130; Griswold v. Bacheller, 77 Fed. R. 857. In that case an order overruling the demurrer is equivalent to an order sustaining the plea. Zimmerman v. So Relle, 80 Fed. R. 417. See McVeagh v. Denver C. V. Co. (C. C. A.), 85 Fed. R. 74; Stead's Ex'rs v. Course, 4 Cranch, 403, 410.

[3] Rumbold v. Forteath, 2 Jur. (N. S.) 686.

[4] Green, J., in Kellner v. Mut. L. Ins. Co., 43 Fed. R. 623, 626. Where a complainant had a demurrer and plea set down for argument, instead of moving to strike them from the files or filing a replication; held, that he had waived the question whether the defendant had not by his previous action in the suit waived the defense set up by the plea and demurrer. Farmers' L. & T. Co. v. Chicago & N. P. R. Co., 61 Fed. R. 543.

[5] Mellus v. Thompson, 1 Cliff. 125; Ex'rs of Gallagher v. Roberts, 1 Wash. 320; Farley v. Kitson, 120 U. S. 303; Kellner v. Mut. L. Ins. Co., 43 Fed. R. 623, 626.

[6] Wheeler v. McCormick, 8 Blatchf. 267.

[7] Merritt v. American S. B. Co., 79 Fed. R. 228.

[8] Mitford's Pl., ch. 2, § 2, part 2. See Rhode Island v. Massachusetts, 14 Pet. 210, 257-259.

averments necessary to support it, are true."[9] If, therefore, a plea is allowed upon argument the plaintiff may take issue upon it, and have a trial of the truth of the facts upon which it is sought to be supported.[10] "If a plea accompanied by an answer is allowed, the answer may be read at the hearing of the cause to counterprove the plea."[11] If upon the hearing any demurrer or plea be allowed, the defendant is entitled to his costs. But the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill upon such terms as it shall deem reasonable.[12] "If, upon argument, the benefit of a plea is saved to the hearing, it is considered that so far as appears to the court it is a full defense, but that there may be matter disclosed in evidence which would avoid it, supposing the matter pleaded to be strictly true; and the court therefore will not preclude the question."[13] In such a case, the truth of the plea must be established, and at the hearing the plaintiff may avoid it by other matter, which he is at liberty to prove.[14] "When a plea is ordered to stand for an answer, it is merely determined that it contains matter which may be a defense, or part of a defense; but that it is not a full defense, or it has been informally offered by way of plea, or it has not been properly supported by answer, so that the truth of it is doubtful. For if a plea requires an answer to support it, upon argument of the plea the answer may be read to counterprove the plea; and if the defendant appears not to have sufficiently supported his plea by his answer, the plea must be overruled, or ordered to stand for an answer only. A plea is usually ordered to stand for an answer where it states matter which may be a defense to the bill, though perhaps not proper for a plea, or informally pleaded. But if a plea states nothing which can be a defense, it is merely overruled. If a plea is ordered to stand for an answer, it is allowed to be a sufficient answer to so much of the bill as it covers, unless by the bill liberty is given to except. But that liberty may be qualified, so as to protect the defendant from any particular discovery which he

[9] Mitford's Pl., ch. 2, § 2, part 2; U. S. v. Dalles Military Road Co., 140 U. S. 599, 616.

[10] Ibid.

[11] Ibid.

[12] Equity Rule 35.

[13] Mitford's Pl., ch. 2, § 2, part 2; Dobson v. Peck Bros. & Co., 103 Fed. R. 904.

[14] Story's Eq. Pl., § 698; Rhode Island v. Massachusetts, 14 Pet. 210, 257-259.

ought not to be compelled to make; and if a plea is accompanied by an answer, and is ordered to stand for an answer without liberty to except, the plaintiff may yet except to the answer as insufficient to the parts of the bill not covered by the plea."[15] Where one defense is made by the plea and another by an answer filed with it, the plea may be ordered to stand for an answer.[16]

A plea formerly might have been overruled for three reasons: because it was bad, as defective in form, or insufficient in point of law; because, though good as to a part of the bill, it was filed to more than it could cover; and because the defendant answered some or all of the matters covered by it.[17] Now, however, a pure plea, though filed to the whole bill, may be sustained as to a part only.[18] If upon the hearing any plea is overruled, the plaintiff is entitled to his costs in the cause up to that period, unless the court is satisfied that the defendant had good ground, in point of law or fact, to interpose the same, and it was not interposed vexatiously or for delay. And upon the overruling of any plea, the defendant is assigned to answer the bill, or so much thereof as is covered by the plea, the next succeeding rule-day, or at such other period as, consistently with justice and the rights of the defendant, the same can in the judgment of the court be reasonably done; in default whereof, the bill is taken against him *pro confesso*, and the matter thereof proceeded in and decreed accordingly.[19] Under this rule it has been held that permission to answer cannot be denied the defendant.[20] Upon the overruling of a plea, permission to amend it may be given,[21] or a second plea upon a different ground may be interposed, but only by leave of the court.[22] If put in without leave, such a new plea will, on mo-

[15] Mitford's Pl., ch. 2, § 2, part 2; Chisholm v. Johnson, 84 Fed. R. 384.

[16] Lewis v. Baird, 3 McLean, 56, 62.

[17] Wigram on Discovery (1st ed.), 172–181; Story's Eq. Pl., §§ 688, 693; Thring v. Edgar, 2 Sim. & S. 274; Salkeld v. Science, 2 Ves. Sen. 107; Chamberlain v. Agar, 2 V. & B. 259; Stearns v. Page, 1 Story, 204; Ferguson v. O'Harra, Pet. C. C. 493.

[18] Equity Rules 36, 37; Wythe v. Palmer, 3 Saw. 412; Kirkpatrick v. White, 4 Wash. 595; Rhino v. Emery, 79 Fed. R. 483. But see Milligan v. Milledge, 3 Cranch, 220.

[19] Equity Rule 36.

[20] Wooster v. Blake, 7 Fed. R. 816.

[21] Sanders v. King, 6 Madd. 61; Loving v. Fairchild, 1 McLean, 333; U. S. R. S., § 954.

[22] McKewan v. Sanderson, L. R. 16 Eq. 316; Chadwick v. Boardwood, 3 Beav. 316; Lamb v. Starr, Deady, 350; Wheeler v. McCormick, 8 Blatchf. 267.

tion, be taken off the file.[23] It seems that after his plea is overruled, the defendant may demur, at least to a part of the bill, by leave of the court.[24] By the English practice, if the plaintiff set down a plea for argument, he admitted its truth; and if good in form it was sustained.[25]

§ 141. Motion for a reference of a plea.— There are some pleas upon which no issue is taken. Such were pleas of outlawry and excommunication, which were always pleaded *sub sigillo*, that is, under the seal of the court which had pronounced the sentence. The truth of the fact pleaded in them could, therefore, be ascertained from the form of pleading. The plaintiff was, however, at liberty to show that the plea was defective in form, or that it did not apply to the particular case; and for these purposes he might have the plea argued.[1] "Pleas of a former decree, or of another suit depending in the same court, but not in another court,"[2] are generally in the same predicament, being referred to a master to inquire into the fact. If in any of these cases, the master reports the fact true, the bill stands instantly dismissed, unless the court otherwise orders. But the plaintiff may except to the master's report, and bring on the matter to be argued before the court; and if he conceives the plea to be defective, in point of form or otherwise, independent of the mere truth of the fact pleaded, he may set down the plea to be argued as in the case of pleas in general."[3] Where it is manifest upon the face of the plea that the two suits are not alike, no reference will be ordered.[4]

§ 142. Hearing upon pleas.— If the complainant deems a plea sufficient in form, or it has been so held by the court, he can still test its truth by taking issue upon it.[1] He does this by filing the general replication.[2] The proceedings in taking testimony, and bringing the cause to a hearing, are substan-

[23] McKewan v. Sanderson, L. R. 16 Eq. 316.

[24] East India Co. v. Campbell, 1 Ves. Sen. 246; Daniell's Ch. Pr. (5th Am. ed.) 702.

[25] Tarleton v. Barnes, 2 Keen, 632. See Story's Eq. Pl., §§ 743, 744.

§ 141. [1] Mitford's Pl., ch. 2, § 2, part 2.

[2] Zimmerman v. So Relle, 80 Fed. R. 417.

[3] Mitford's Pl., ch. 2, § 2, part 2. See also Emma S. M. Co. v. Emma S. M. Co. of N. Y., 1 Fed. R. 39: Jones v. Segueira, 1 Phillips, 82; Story's Eq. Pl., §§ 700, 743, 744.

[4] Loring v. Marsh, 2 Cliff. 311.

§ 142. [1] Mitford's Pl., ch. 2, § 2, part 2; Rhode Island v. Massachusetts, 14 Pet. 210, 257.

[2] Hughes v. Blake, 6 Wheat. 453.

tially the same as after an issue raised upon an answer.[3] At the hearing the defendant has the right to open and close the argument, and the burden of proof rests upon him.[4] If the plea be then found false, it has been held that the plaintiff may, if he so choose, have the bill taken *pro confesso*.[5] "Having put the plaintiff to the trouble and delay of an issue, the defendant cannot, after it has been found against him, claim the right to file an answer, although, if the complainant desires a discovery, which the plea is sought to avoid, he may undoubtedly insist upon it."[6] In an extraordinary case, however, the court might still allow the defendant to answer.[7] In a few later cases, the Supreme Court, where the issues raised by a plea were found against the defendant, allowed him to answer.[8] It has been held: that, where part of the issues are found for the defendant, he is entitled, under the thirty-third equity rule, to have the benefit of the facts so found for him and that the decree should be limited accordingly.[9] If the plea were found true, according to the former practice the plea was held a complete defense to so much of the bill as it was intended to apply to; and if filed to the whole bill, the bill would be dismissed as of course, irrespective of the sufficiency of the plea.[10] Now, however, the equity rules provide that "if, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him."[11] This gives the court power then merely to save the benefit of the plea to the hearing, and the

[3] Reissner v. Anness, 13 Off. Gaz. 7; Lilienthal v. Washburn, 8 Fed. R. 707; Hughes v. Blake, 6 Wheat. 453, 472; Farley v. Kittson, 120 U. S. 303.

[4] Stead's Ex'rs v. Course, 4 Cranch, 403, 413; Gernon v. Boecaline, 2 Wash. 199; Farley v. Kittson, 120 U. S. 303; Lilienthal v. Washburn, 8 Fed. R. 707; Sharon v. Hill, 23 Fed. R. 28.

[5] Kennedy v. Creswell, 101 U. S. 641, 644; Mitford's Pl., ch. 2, § 2, part 2.

[6] Bradley, J., in Kennedy v. Creswell, 101 U. S. 641, 644.

[7] Taney, C. J., in Poultney v. La Fayette, 12 Pet. 472, 474.

[8] Farley v. Kittson, 120 U. S. 303; Dalzell v. Dueber W. C. Mfg. Co., 149 U. S. 315, 326. See Elgin W. P. & P. Co. v. Nichols (C. C. A.), 65 Fed. R. 215.

[9] Earll v. Metropolitan St. R. Co., 87 Fed. R. 528.

[10] Hughes v. Blake, 6 Wheat. 453; s. c., 1 Mason, 515; Rhode Island v. Massachusetts, 14 Pet. 210, 257; Myers v. Dorr, 13 Blatchf. 22; Theberath v. Rubber & C. H. T. Co., 5 Bann. & A. 584; Cottle v. Krementz, 25 Fed. R. 494; Birdseye v. Heilner, 26 Fed. R. 147; Bean v. Clark, 30 Fed. R. 225; Daniells v. Benedict (C. C. A.), 97 Fed. R. 367; Horn v. Detroit D. D. Co., 150 U. S. 610.

[11] Rule 33. But see Myers v. Dorr, 13 Blatchf. 22.

plaintiff may, in such a case, avoid it by other matter which he is at liberty to adduce.[12] It has been held that after a replication has been filed and testimony taken, the court may, without examining the testimony, overrule the plea for insufficiency and allow the defendant to answer.[13] If, however, the truth of a plea upon which issue has been joined is established, and the plea meets and satisfies all the claims of the bill, the defendant is entitled to a decree.[14] If the truth of a plea is not established upon issue joined, the bill cannot before answer be dismissed for want of equity.[15] Leave to withdraw the replication and amend or to set down the plea for argument may under special circumstances be obtained.[16] By replying to a plea, objections to its form or for a failure to support it by answer are waived.[17] Pending an issue upon a plea all proceedings not germane to the same are usually stayed.[18]

§ 143. General remarks upon pleas.—In conclusion, it may be remarked that the cautious practitioner will act wisely in eschewing the use of pleas, unless he desires to plead matter in abatement, or in extraordinary cases. For it is as true now as in the time of Beames, that the subject of pleas in equity is one "concerning which so much still remains to be elucidated, that it may be said of them, *maxima pars eorum quae scimus est minima eorum quae ignoramus.*"[1]

[12] Pearce v. Rice, 142 U. S. 28; Elgin W. P. & P. Co. v. Nichols, 65 Fed. R. 215, 218.

[13] Matthews v. Lalance & G. Mfg. Co., 2 Fed. R. 232. But see Myers v. Dorr, 13 Blatchf. 22; Theberath v. Rubber & C. H. T. Co., 5 Bann. & A. 584; Cottle v. Krementz, 25 Fed. R. 494. See Chisholm v. Johnson, 84 Fed. R. 384.

[14] Horn v. Detroit T. D. Co., 150 U. S. 610, 625; Rejall v. Greenhood, 92 Fed. R. 945; McAleer v. Lewis, 75 Fed. R. 734.

[15] Farley v. Kittson, 120 U. S. 303.

[16] Cottle v. Krementz, 25 Fed. R. 494; Hughes v. Blake, 6 Wheat. 453, 473; Equity Rules 29 and 35.

[17] Stead's Executor v. Course, 4 Cranch, 403; Farley v. Kittson, 120 U. S. 303; U. S. v. California & O. L. Co., 148 U. S. 31.

[18] Playford v. Lockard, 65 Fed. R. 870.

§ 143. [1] Beames on Pleas, 61.

CHAPTER X.

ANSWERS AND DISCLAIMERS.

§ 144. Pleading defenses in an answer.—An answer in equity serves two purposes: the setting up of the defenses to the suit, and discovery. It cannot ordinarily pray relief against the complainant, and never against a co-defendant.[1] If a defendant desires such relief he must ordinarily file a cross-bill.[2] The defendant is entitled in all cases by answer to insist upon all matters of defense (not being matters of abatement, or to the character of the parties, or matters of form), in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar.[3] Matters in abatement, such as *lis pendens*, which do not affect the jurisdiction, cannot be set up by answer.[4] An answer may contain defenses which have been previously raised by plea or demurrer and overruled.[5] Facts that have occurred since the filing of the bill may be pleaded in an answer.[6] The defenses must not be inconsistent with each other.[7] If so, it seems that both will be disregarded,[8]

§ 144. [1] Ford v. Douglas, 5 How. 143; Hubbard v. Turner, 3 McLean, 519; Morgan v. Tipton, 3 McLean, 339; Chapin v. Walker, 6 Fed. R. 794; s. c., 2 McCrary, 175.

[2] See *infra*, §§ 170, 171. It has been held in New York that the defense that a contract was executed under undue influence can be set up by answer without a cross-bill. McCabe v. Cooney, 2 Sand. Ch. 347.

[3] Rule 39.

[4] Pierce v. Feagans, 39 Fed. R. 587; *supra*, § 125.

[5] Crawford v. The William Penn, 3 Wash. 484; Burnley v. Jeffersonville, 3 McLean, 336; Storms v. Kansas Pac. Ry. Co., 5 Dill. 486; Rhode Island v. Massachusetts, 14 Pet. 210.

[6] Earl of Leicester v. Perry, 1 Brown Ch. C. 305; Turner v. Robinson, 1 Sim. & S. 3.

[7] Chapman v. School Dist. No. 1, Deady, 108, 115; Jesus College v. Gibbs, 1 Y. & C. 145, 147; Leech v. Bailey, 6 Price, 504; Daniell's Ch. Pr. (5th Am. ed.) 714. It is not considered inconsistent for a defendant both to deny the complainant's title and to allege that he has waived a right which he claims under it. Carte v. Ball, 3 Atk. 496, 499; Comstock v. Herron, 45 Fed. R. 660; Daniell's Ch. Pr. (5th Am. ed.) 714. The defense of a license from the plaintiff to commit the acts complained of is, in the absence of special covenants or recitals in the license, not inconsistent

[8] Jesus College v. Gibbs, 1 Y. & C. 145; Daniell's Ch. Pr. (5th Am. ed.) 714.

unless the inconsistent allegations are trifling, when they may be treated as surplusage.[9] The defenses must be pleaded with sufficient certainty;[10] although it seems that the same degree of certainty is not required in an answer as in a bill,[11] or a plea.[12] The general rule is that no affirmative defense can be proved unless it has been set up in the answer.[13] In a suit to restrain the infringement of a patent, a license is an affirmative defense.[14] It has been said that, if a defendant states in his answer certain facts as evidence of a particular case, which he represents to be the consequence of those facts, and upon which he rests his defense, he is not permitted afterwards to make use of the same facts, for the purpose of establishing a different defense from that to which, by his answer, he has drawn the plaintiff's attention.[15] Thus it has been said that where fraud is set up in the answer "the party making the charge, if it is denied in a proper pleading, will be confined to that issue."[16]

§ 145. Defenses peculiar to patent cases.—The Revised Statutes provide that the defendant to a suit in equity for relief against an alleged infringement of a patent may set up in his answer any one or more of the following defenses, and give

with other defenses impugning the validity of complainant's patent. National Mfg. Co. v. Meyers, 7 Fed. R. 855. It was held to be consistent to qualify in one part of an answer a denial in another, and to plead different statutes of limitations. Von Schroder v. Brittain, 98 Fed. R. 169.

[9] Jenkinson v. Royston, 5 Price, 496, 510; Daniell's Ch. Pr. (5th Am. ed.) 714.

[10] Graham v. Mason, 4 Cliff. 88; Armstrong v. Lear, 8 Pet. 52. It has been said that "the respondent cannot set up as a defense that if complainant's patent be so construed as to cover the machine made and sold by him, then the machine embraced in said patent was known and used prior to the invention thereof by the patentee." Graham v. Mason, 4 Cliff. 88. An averment that a patent "was obtained upon false and fraudulent representations by the plaintiff, or some of them, made to the Commissioner of Patents, and is wholly void at law," is also too uncertain to be sufficient to constitute a defense. Clark v. Scott, 5 Fisher, 245.

[11] Daniell's Ch. Pr. (5th Am. ed.) 714.

[12] Maury v. Mason, 8 Porter (Ala.), 213, 228.

[13] Stanley v. Robinson, 1 Russ. & M. 527; Cummings v. Coleman, 7 Rich. (S. C.) Eq. 509, 520; Burnham v. Dalling, 3 C. E. Green (18 N. J. Eq.), 132; Daniell's Ch. Pr. (5th Am. ed.) 712; Black v. Thorne, 10 Blatchf. 66, 84; Sperry v. Erie Ry. Co., 6 Blatchf. 425.

[14] Watson v. Smith, 7 Fed. R. 350.

[15] Langdell's Eq. Pl., § 79; Bennett v. Neale, Wightwick, 324.

[16] French v. Shoemaker, 14 Wall. 314, 335. See § 70.

notice therein that he will offer proof of the same: "First, that for the purpose of deceiving the public the description and specification filed by the patentee in the Patent Office was made to contain less than the whole truth relative to his invention or discovery, or more than is necessary to produce the desired effect; or, second, that he had surreptitiously or unjustly obtained the patent for that which was in fact invented by another, who was using reasonable diligence in adapting and perfecting the same; or, third, that it had been patented or described in some printed publication prior to his supposed invention or discovery thereof; or, fourth, that he was not the originator and first inventor or discoverer of any material and substantial part of the thing patented; or, fifth, that it had been in public use or on sale in this country for more than two years before his application for a patent, or had been abandoned to the public. And in notices as to proof of previous invention, knowledge or use of the thing patented, the defendant shall state the names of patentees and the dates of their patents, and when granted, and the names and residences of the persons alleged to have invented, or to have had the prior knowledge of the thing patented, and where and by whom it had been used; and if any one or more of the special matters alleged shall be found for the defendant, a decree shall be entered in his favor with costs."[1] Such a notice need not be under oath, and a consent to an order that the answer be considered as amended by the insertion of such defense and notice is a waiver of any further oath.[2] Under this statute it has been held that no evidence can be admitted in support of any of these defenses unless it has been properly pleaded and the requisite notice has been given to the complainant;[3] but that the respondent, after pleading these defenses or some of them, with the names of such of the persons therein referred to as he knows, may also plead a general allegation "that the same had been previously invented and known and used by many

§ 145. [1] U. S. R. S., § 4920. *Cf.* Anderson v. Miller, 129 U. S. 70; *infra*, § 360.

[2] Campbell v. Mayor of N. Y., 45 Fed. R. 243.

[3] Teese v. Huntington, 23 How. 2; Agawam Co. v. Jordan, 7 Wall. 583; Blanchard v. Putnam, 8 Wall. 420; Bates v. Coe, 98 U. S. 31; Pitts v. Edmonds, 2 Fisher, 52, 54; Salamander Co. v. Haven, 3 Dill. 131; Jennings v. Pierce, 15 Blatchf. 42; Williams v. Boston & A. R. Co., 17 Blatchf. 21; Decker v. Grote, 10 Blatchf. 331.

other persons whose names are unknown to the respondent, which, when known, the respondent prays leave to insert and set forth in the answer."[4] Upon the subsequent discovery of any such persons, testimony concerning them may be taken, and leave obtained from the court to insert their names in the answer by amendment *nunc pro tunc*. An order to this effect may be obtained before or after the testimony has been taken.[5] It seems that when a previous patent has not been referred to in an answer, such patent may still be proved, as evidence of a prior use of the invention, which has been properly pleaded,[6] to show the state of the art at the date of the complainant's alleged invention.[7] The defense of a want of patentability need not be pleaded in the answer.[8] It is unsettled whether the defense of insufficient description can be set up without alleging an intent to deceive the public.[9] The statute requires

[4] Roemer v. Simon, 95 U. S. 214, 220; Brown v. Hall, 6 Blatchf. 405.

[5] Ibid.

[6] Atlantic Works v. Brady, 107 U. S. 192. But see Parks v. Booth, 102 U. S. 96, 105; Kennedy v. Solar Ref. Co., 69 Fed. R. 715.

[7] Am. S. Co. v. Hogg, 1 Holmes, 133; s. c., 6 Fisher, 67; Stevenson v. Magowan, 31 Fed. R. 824.

[8] Stevenson v. Magowan, 31 Fed. R. 824.

[9] Loom Co. v. Higgins, 105 U. S. 580, 588, 589; Grant v. Raymond, 6 Pet. 218; Whittemore v. Cutter, 1 Gall. 429; Lowell v. Lewis, 1 Mason, 182; Gray v. James, Pet. C. C. 394.

It has been said concerning the defense of want of novelty: "Where the thing patented is an entirety, consisting of a separate device or of a single combination of old elements incapable of division or separate use, the respondent cannot make good the defense in question by proving that a part of the entire invention is found in one prior patent, printed publication, or machine, and another part in another, and so on indefinitely, and from the whole or any given number expect the court to determine the issue of novelty adversely to the complainant." . . . "Defenses of the kind, if the thing patented is an entirety, incapable of division or separate use, must be addressed to the invention, and not to a part of it, or to one or more claims of the patent, of less than the entire invention. More than one patent may be included in one suit, and more than one invention may be secured in the same patent: in which cases the several defenses may be made to each patent in the suit, and to each invention, to which the charge of infringement relates." Mr. Justice Clifford, in Parks v. Booth, 102 U. S. 96, 104; citing Bates v. Coe, 98 U. S. 31. It has been said that a defense charging that the original patentee "fraudulently and surreptitiously obtained the patent for that which he well knew was invented by another, unaccompanied by the further allegation that the alleged first inventor was at the time using reasonable diligence in adapting and perfecting the invention, is not sufficient to defeat the patent, and constitutes no defense to the charge of infringement." Clifford, J., in Agawam Co. v. Jordan, 7 Wall. 583, 597.

notice of the names and residences of the inventors and of those who have the prior knowledge of the thing patented, not the names of the witnesses.[10] Notice of the time when the person named possessed a knowledge or use of the invention is not required.[11] The omission of the place of the use makes the notice fatally defective.[12] The question whether a defendant has an interest in the patent which is the foundation of the bill, and whether he has a license to use such patent, cannot be considered unless specifically raised by plea or answer.[13]

§ 146. Admissions and denials independent of discovery.— According to Professor Langdell, "If the defendant has no affirmative defense, the answer need contain nothing but discovery, unless the defendant proposes to offer a line of evidence in disproof of the bill which may take the plaintiff by surprise; in which case it will be prudent to indicate the nature of such evidence in the answer. This should be done also whenever it is at all doubtful whether the evidence establishes an affirmative defense or is in denial of the bill."[1] Although the weight of authority is in support of the rule that a failure to deny an allegation in the bill does not operate as an admission of its truth, provided some answer is made,[2] it is more prudent and is customary, even when an answer under oath is waived, for the defendant to deny or admit every allegation in the bill; and out of abundant caution, a general traverse denying the unlawful combination charged in the bill, and all other matters therein contained, is still often inserted after the specific denials.[3] The statement that the respondent believes an

[10] Woodbury P. Mach. Co. v. Keith, 101 U. S. 479; Roemer v. Simon, 95 U. S. 214.

[11] Phillips v. Page, 24 How. 164.

[12] Schenck v. Diamond Match Co. (C. C. A.), 77 Fed. R. 208; s. c., 71 Fed. R. 521.

[13] Puetz v. Bransford, 31 Fed. R. 458.

§ 146. [1] Langdell's Eq. Pl., § 79.

[2] Young v. Grundy, 6 Cranch, 51; Brown v. Pierce, 7 Wall. 205, 211; Brooks v. Byam, 1 Story, 296, 302; Rule 61. But see Commercial M. M. Ins. Co. v. Union M. Ins. Co., 19 How. 318, 323; Agawam Co. v. Jordan, 7 Wall. 583, 609; Webb v. Powers, 2 W. & M. 497, 510; Myers v. Busby, 32 Fed. R. 770.

[3] See Story's Eq. Pl., § 870. When defendants avoid answering specific interrogatories concerning a charged infringement, but merely deny the use of any machinery "in violation and infringement of any rights of the plaintiff, or that they are using, or have made, or sold, or used any machines not protected or covered by the proviso in the act of Congress," it seems that they thereby presumptively admit infringement. Agawam Co. v. Jordan, 7 Wall. 583,

allegation to be true is equivalent to an admission;[4] but the statement that he has no knowledge upon the subject seems to be equivalent to a denial,[5] although, if full discovery be required, it is subject to exception for insufficiency.[6] The denial of a conclusion of law is of no effect.[7] There is no need of a denial of the common confederacy clause unless accompanied by special charges of combination.[8]

§ 147. Impertinence and scandal.— An answer should contain no impertinence or scandal.[1] What constitute scandal and impertinence has been explained in the chapter on Bills.[2] Usually nothing is considered scandalous which is relevant or responsive to the allegations of the bill.[3] But in an English case brought by a clergyman, where the defendant included in a schedule of accounts a charge for money paid by him for an order of filiation of a bastard made upon the plaintiff, the court held the item, although relevant, a proper subject of exception, because the mode of bringing it forward was intended to drive

609. A denial of two allegations conjunctively is not a denial of each. Pierson v. Ryerson, 5 N. J. Eq. 196.

[4] Brooks v. Byam, 1 Story, 296, 311.

[5] Brown v. Pierce, 7 Wall. 205, 212; Brooks v. Byam, 1 Story, 296.

[6] Kittredge v. Claremont Bank, 1 W. & M. 244.

[7] Union M. Ins. Co. v. Commercial M. M. Ins. Co., 2 Curt. 524; s. c. on appeal, as Commercial M. M. Ins. Co. v. Union M. Ins. Co., 19 How. 318, 319. Thus, when the bill alleged that the defendant executed and delivered a deed, a denial by the defendant of its delivery, accompanied by an admission that he made the deed and placed it upon record, is equivalent to an admission of its delivery. Adams v. Adams, 21 Wall. 185. An admission in an answer that the defendant had made locks of the kind described in the patent sued upon, "is satisfied by assuming that the smallest number of locks were made consistent with the use of that word in the plural, and with the use by the defendants of any part of the patent which is valid." See Miller, J., in Jones v. Morehead, 1 Wall. 155, 165. But compare Troy I. & N. Factory v. Corning, 6 Blatchf. 328, 336, 337. An admission that a deed bears a certain date does not estop the respondent from showing that it was fraudulently antedated. Holbrook v. Worcester Bank, 2 Curt. 244.

[8] Story's Eq. Pl., §§ 30 with note, and 856; Rule 32.

§ 147. [1] Story's Eq. Pl., §§ 861–863; Langdon v. Goddard, 3 Story, 13.

[2] See § 68, *supra*.

[3] Peck v. Peck, Mosely, 45; Woods v. Morrell, 1 J. Ch. (N. Y.) 103, 106; Fisher v. Owen, L. R. 8 Ch. D. 645, 653; Story's Eq. Pl., § 862. An allegation that a previous decree was made "without a full reading of the proofs in the cause, or a careful consideration of the briefs of the counsel filed therein," and not "after full consideration," is not scandalous; for it contains no imputation upon the court. Miller v. Buchanan, 5 Fed. R. 366. Allegations to meet charges of bad faith made in the bill were held not scandalous. Mercantile Tr. Co. v.

the plaintiff out of his parish.[4] It may be doubted whether so much respect for the cloth would be shown by an American court. Exceptions for impertinence are only allowed when it is apparent that the matter excepted to is not material or relevant, or is stated with needless prolixity. If it *may* be material, the exception will not be allowed, as that would leave the defendant without remedy, but the allegations excepted to will be allowed to remain in the answer, and the effect thereof, if found to be true, determined on the final hearing.[5] It has been said to be permissible; and it is customary to plead in answers in equity matters of law as well as matters of fact which constitute a defense.[6] It has been held that a short sentence inserted out of abundant caution will not be expunged as impertinent.[7] Neither is new matter not responsive to the bill setting up an insufficient defense the proper subject of an exception for impertinence,[8] although such matter has been expunged by motion.[9] A demurrer to an answer is not permitted.[10] Exceptions to answers for scandal and impertinence are taken and disposed of in substantially the same manner as exceptions to bills for the same reasons.[11] Exceptions for impertinence should be filed and disposed of before exceptions for insufficiency are filed.[12]

§ 148. Discovery.—Discovery, or answer under oath, which was formerly one of the principal grounds of equitable juris-

Mo., K. & T. Ry. Co., 84 Fed. R. 879.

[4] Atty. Gen. v. Hewit, in Chanc., July, 1801; cited in Cooper's Eq. Pl. 319; Story's Eq. Pl., § 862.

[5] Deady, J., Chapman v. School Dist. No. 1, Deady, 108, 110.

[6] Farmers' L. & T. Co. v. N. P. R. Co., 76 Fed. R. 15. But see Florida Mtge. & Inv. Co. v. Finlayson, 74 Fed. R. 671.

[7] Desplaces v. Goris, 1 Edw. Ch. (N. Y.) 350.

[8] Adams v. Bridgewater I. Co., 6 Fed. R. 179; Bower-Barff R. I. Co. v. Wells R. I. Co., 43 Fed. R. 391. But see Ford v. Douglas, 5 How. 143, 165; Harrison v. Perea, 168 U. S. 311; s. c. below, 7 N. M. 666. An allegation in an answer that plaintiff brought this suit in a State distant from that of the defendants' residence for the purpose of harassing them and involving them in large expense was held to be impertinent. Whittemore v. Patten, 84 Fed. R. 51.

[9] Armstrong v. Chem. Nat. Bank, 37 Fed. R. 466; Adams v. Bridgewater I. Co., 6 Fed. R. 179; Gilchrist v. Helena, etc. R. Co., 47 Fed. R. 593.

[10] Crouch v. Kerr, 38 Fed. R. 549.

[11] See Equity Rules 26 and 27; Hood v. Inman, 4 J. Ch. (N. Y.) 437; Langdon v. Goddard, 3 Story, 13; *supra*, § 68.

[12] Patriotic Bank v. Bank of Washington, 5 Cranch C. C. 602.

diction, is now of little practical importance. For the statutes of the United States, as well as those of all of the individual members of the American Union with which the writer has any acquaintance, allow the full benefits of discovery to be obtained by the oral examination of any party or person otherwise interested in the cause on trial.[1] Moreover, a recent amendment to the equity rules provides that, "if the complainant, in his bill, shall waive an answer under oath, or shall only require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause be set down for hearing on bill and answer only; but may nevertheless be used as an affidavit with the same effect as heretofore upon a motion to grant or dissolve an injunction, or on any other incidental motion in the cause; but this shall not prevent a defendant from becoming a witness in his own behalf under section 3 of the act of Congress of July 2, 1864."[2] Consequently, an answer under oath is now usually waived by the complainant.[3] When no such waiver is made, however, the old rule still prevails; and the sworn statement by the defendant in direct response to an allegation in the bill is deemed to be true, unless contradicted by two witnesses, or a single witness and corroborating circumstances.[4] Irresponsive allegations are not evidence.[5] Neither are allegations upon information and belief,[6] nor allegations sworn to positively, concerning facts of which it is evident the respondent can have no personal knowledge.[7] The admissions of the defendant are binding upon him; and unless he can obtain leave to amend his answers by withdrawing

§ 148. [1] U. S. R. S., § 858. See *infra*, §§ 109, 281.

[2] Amendment of December, 1871, to Equity Rule 41. The statute cited is now U. S. R. S., § 858. See Woodruff v. Dubuque & S. C. R. Co., 30 Fed. R. 91.

[3] See Slessinger v. Buckingham, 17 Fed. R. 454, 456.

[4] Clark's Ex'rs v. Van Riemsdyk, 9 Cranch, 153, 160; Union Bank of Georgetown v. Geary, 5 Pet. 99, 110; Seitz v. Mitchell, 94 U. S. 580, 582; Vigel v. Hopp, 104 U. S. 441; Slessinger v. Buckingham, 17 Fed. R. 454, 456.

[5] Sargent v. Larned, 2 Curt. 340; Seitz v. Mitchell, 94 U. S. 580.

[6] Berry v. Sawyer, 19 Fed. R. 286; Allen v. O'Donald, 28 Fed. R. 17; Earle v. Art L. Pub. Co., 95 Fed. R. 54.

[7] Clark's Ex'rs v. Van Riemsdyk, 9 Cranch, 153, 161; Allen v. O'Donald, 28 Fed. R. 17.

them, he cannot disprove them at the hearing.[8] When discovery is required, the defendant must answer every allegation in the bill which is material to the plaintiff's case, and an answer admitting which would not expose him to a penalty, forfeiture or criminal prosecution, or expose a privileged communication.[9] "It is not a sufficient foundation of exception that a fact charged in a bill is not answered, unless the fact is material and might contribute to support the equity of the plaintiff's case, and induce the court to give the relief sought by the bill."[10] The former practice required that if a defendant submitted to answer, he must in general answer fully; and that he could usually protect himself from a full discovery only by a plea or demurrer to the objectionable part of the bill.[11] Now, however, the Equity Rules provide that "the rule that if a defendant submits to answer he shall answer fully to all the matters of the bill, shall no longer apply in cases where he might by plea protect himself from such answer and discovery. And the defendant shall be entitled in all cases by answer to insist upon all matters of defense (not being matters of abatement, or to the character of the parties, or matters of form) in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compelled to answer any other matters than he would be compelled to answer and discover upon filing a plea in bar and an answer in support of such plea, touching the matters set forth in the bill, to avoid or repel the bar or defense. Thus, for example, a *bona fide* purchaser for a valuable consideration without notice, may set up that defense by way of answer instead of plea, and shall be entitled to the same protection, and shall not be compelled to make any further answer or discovery of his title than he would be in any answer in support of such plea."[12] "A defendant shall be at liberty, by answer, to decline answering any interrogatory, or part of an interrogatory, from answering which he might have protected himself

[8] Gold & S. O. S. Co. v. U. S. Dis. O. Co., 6 Blatchf. 307, 310. See Troy I. & N. Factory v. Corning, 6 Blatchf. 328, 336.

[9] Atwill v. Ferrett, 2 Blatchf. 39.

[10] Taney, C. J., in Hardeman v. Harris, 7 How. 726.

[11] Hare on Discovery, pp. 247, 296, 297; Story's Eq. Pl., §§ 605, 606, 609, 846; Mazarredo v. Maitland, 3 Madd. 66, 72; —— v. Harrison, 4 Madd. 252.

[12] Rule 39.

by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill from which he might have protected himself by demurrer."[13] If the plaintiff is the only person who can enforce a penalty or forfeiture, and he waives it in his bill, the defendant may be compelled to answer disclosing his liability thereto.[14] There has been much controversy as to whether the defendant to a bill demanding an account can be obliged to give discovery as to the account when he answers denying the equity of the bill and the complainant's right to an account.[15] The better opinion seems to be that he can. Such is the doctrine of Professor Langdell,[16] and of the last English case upon the subject.[17] No discovery can be required of an infant,[18] or other person under a disability;[19] nor, it seems, of a corporation,[20] or a public officer when sued in his official capacity.[21] But it has been held that, although a corporation cannot be compelled to answer under oath, it can be compelled to answer, and to answer fully.[22] The defendant must answer specifically and categorically, distinguishing between matters within his personal knowledge and those within his information and belief.[23] If he asserts ignorance as to any matter, he must aver that he is ignorant both of his own knowledge and as to information and belief.[24]

[13] Rule 44.

[14] Lord Uxbridge v. Staveland, 1 Ves. Sen. 56; Atwill v. Ferrett, 2 Blatchf. 39.

[15] The authorities have been well collected by Chancellor Cooper in French v. Rainey, 2 Tenn. Ch. 640.

[16] Langdell's Eq. Pl., §§ 70–73.

[17] Elmer v. Creasy, L. R. 9 Ch. 69, 71.

[18] Copeland v. Wheeler, 4 Brown, Ch. C. 256; Lucas v. Lucas, 13 Ves. 274; Daniell's Ch. Pr. (2d Am. ed.) 214.

[19] Micklethwaite v. Atkinson, 1 Coll. 173.

[20] Union Bank of Georgetown v. Geary, 5 Pet. 99, 110; Wallace v. Wallace, Halst. (N. J.) Dig. 173; Smith v. St. Louis M. Ins. Co., 2 Tenn. Ch. 599; Burpee v. First Nat. Bank, 5 Biss. 405. But see Kittredge v. Claremont Bank, 3 Story, 590; s. c., 1 W. & M. 245.

[21] Davison v. Atty. Gen., 5 Price, 398, note; Atty. Gen. v. Lambirth, 5 Price, 386, 398; U. S. v. McLaughlin, 24 Fed. R. 823.

[22] Hale v. Continental L. Ins. Co., 16 Fed. R. 718; s. c., 20 Fed. R. 344; Gamewell F. A. Tel. Co. v. City of New York, 31 Fed. R. 312.

[23] Brooks v. Byam, 1 Story, 296; Kittredge v. Claremont Bank, 3 Story, 596; s. c., 1 W. & M. 244. It has been said that the defendant must answer not only as to all facts within his knowledge, but to all which he can ascertain from an inspection of books and papers in his possession or under his control. Davis v. Mapes, 2 Paige (N. Y.), 105.

[24] Brooks v. Byam, 1 Story, 296; Kittredge v. Claremont Bank, 1 W. & M. 244. It has been held that when the bill asks for testimony concerning his recollection he must give it

He cannot deny that he has no knowledge as to a subject which the bill charges as a personal transaction in which he took part.[25] This last rule, it has been said, applies to officers of corporations.[26] If new officers have succeeded those in office at the time when the matters charged are said to have occurred, it is their duty, when called upon for discovery, to ascertain the facts by searching the records of the corporation and by inquiry of their predecessors.[27] It has been said that "a corporate answer should be made by the principal officer of the corporation, who should be able to admit or deny the facts charged and interrogated about, or to state want of knowledge clearly and truly as a reason for not doing it."[28] It is insufficient to deny any "recollection or belief" as to a transaction in which the defendant is said to have been personally engaged.[29] "The defendant in his answer must state the facts as they then are."[30] But where a bill charged that the defendant would in future infringe a patent as he was charged to have done before, it was held insufficient for him to merely deny that he had done so since the trial of an action at law which established the complainant's rights.[31] He has also to answer as to his future intentions.[32] In drawing such an answer, it is usual and often advantageous to interweave the discovery with a narrative of the transactions from the defendant's point of view in a continuous statement, so that it will be hard for the plaintiff to read as evidence the defendant's admissions without also reading the latter's own explanation and account of the controversy.

accordingly. Brooks v. Byam, 1 Story, 296. In extraordinary cases, answers as to the defendants' remembrance have been allowed, even when there was no request for the remembrance upon the subject. Hall v. Bodily, 1 Vernon, 470; Carey v. Jones, 8 Ga. 516; Hall v. Wood, 1 Paige (N. Y.), 404; Story's Eq. Pl., § 855. But see Talbot v. Sebree's Heirs, 31 Ky. 56.

[25] Burpee v. First Nat. Bank, 5 Biss. 405. It has been held that it is insufficient to deny fraud charged to have been committed by an agent upon the information of the agent and the belief of the principal. Mason v. Jones, 1 Hayw. & H. 329; s. c., Fed. Cas. No. 9,240.

[26] Burpee v. First Nat. Bank, 5 Biss. 405; Kittredge v. Claremont Bank, 1 W. & M. 244.

[27] Kittredge v. Claremont Bank, 1 W. & M. 244.

[28] Wheeler, J., in Hale v. Continental L. Ins. Co., 16 Fed. R. 718, 719.

[29] Taylor v. Luther, 2 Sumner, 228.

[30] Sir Thomas Plumer, V. C., in Knight v. Matthews, 1 Madd. 566.

[31] Poppenhusen v. N. Y. G. P. C. Co., 4 Blatchf. 185; s. c., 2 Fish. 74.

[32] Poppenhusen v. N. Y. G. P. C. Co., 4 Blatchf. 185; s. c., 2 Fish. 74.

§ 149. Proceedings to compel answer.— The defendant must file in the clerk's office on the rule-day next succeeding that of entering his appearance, an answer to as much of the bill as he does not cover by a plea or demurrer. In default thereof, unless his time to answer has been enlarged, for cause shown by a judge of the court, upon motion for that purpose, the bill may be taken against him *pro confesso*.[1] When a plea or demurrer is overruled, with leave to the defendant to answer within a certain time, and he fails so to do, the bill may then also be taken *pro confesso*.[2] Otherwise the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, is entitled to process of attachment against the defendant to compel an answer, and the defendant, when arrested upon such process, is not discharged therefrom unless upon filing his answer, or otherwise complying with such order as the court or judge thereof may direct, as to pleading to or fully answering the bill, within a period to be fixed by the court or judge and undertaking to speed the cause.[3] If the attachment is returned *non est inventus*, a commission of rebellion will issue.[4] If this proves insufficient, it will be followed by a writ of sequestration.[5]

§ 150. Frame of answer.— An answer should be entitled in the cause, so as to agree with the names of the parties as they appear in the bill at the time the answer is filed.[1] It seems that the defendant may not correct or alter the names of the parties as they appear in the bill, and that if there is a mistake he must correct it in the part following the title of the cause; thus, "The answer of the defendants, the mayor, alderman, and commonalty in the bill called the mayor, alderman and citizens of the city of New York."[2] The answer should begin substantially thus: "The answer of John Aber, one of the above-named defendants, to the bill of complaint of the above-named plaintiff;" if the bill has been amended after answer, "to the amended bill of complaint."[3] If two or more defend-

§ 149. [1] Equity Rule 18; Heyman v. Uhlman, 34 Fed. R. 686.

[2] Suydam v. Beals, 4 McLean, 12.

[3] Rule 18.

[4] Boudinot v. Symmes, Wall. C. C. 139; Smith's Ch. Pr. (2d ed., 1837), 183, 186.

[5] Smith's Ch. Pr. (2d ed., 1837), 183–188.

§ 150. [1] Daniell's Ch. Pr. (5th Am. ed.) 731.

[2] Atty. Gen. v. Worcester Corp., 1 C. P. Cooper, 18; Daniell's Ch. Pr. (5th Am. ed.) 731.

[3] Daniell's Ch. Pr. (5th Am. ed.) 731; Rigby v. Rigby, 9 Beav. 311, 313.

ants join in the same answer, it usually begins, "The joint and several answer;"[4] unless they are husband and wife, when it is "The joint answer;"[5] but an answer is not defective if put in by several as a joint answer merely.[6] When discovery is required, all of the defendants who join in an answer must swear to the same.[7] When the same solicitor is employed for two or more defendants, and separate answers are filed, or other proceedings had by two or more defendants separately, costs are allowed for such separate answers or other proceedings, unless a master, upon reference to him, certifies that such separate answers and other proceedings were necessary or proper, and ought not to have been joined together.[8] A female defendant who has married since the filing of the bill usually begins: "The answer of John Aber and Anna, his wife, lately in the bill called Anna Brown, spinster," or widow, as the case may be.[9] A title, "the several answer of John Peck, Esq., one of the defendants to the bill of complaint of Anna Baines, alias Green, assuming to herself the name of Anna Peck, as pretended wife of John Peck, Esq., deceased, and of Anna Maria Green, assuming to herself the name of Anna Maria Peck, as daughter of the said John Peck, Esq., deceased," was held scandalous.[10] An answer by a person defending by guardian or next friend should state that fact: "James Fifield by Edward Jennings, his next friend." When an answer and another pleading are united, it should so state: "The demurrer, plea, and answer of," etc.[11] Next followed formerly a clause reserving to the defendant any and all advantages that might be taken by exception to the bill.[12] This always was and still is useless,[13] although many practitioners still use it. Then comes the substantive part of the answer, setting up the matters of affirmative defense and giving the discovery required.[14] The answer usually closes with a general traverse inserted out of abundant caution, denying the unlawful combination charged in the bill, and all other matters therein contained.[15] In the answers of infants

[4] Davis v. Davidson, 4 McLean, 136.
[5] Daniell's Ch. Pr. (5th Am. ed.) 731.
[6] Davis v. Davidson, 4 McLean, 136.
[7] Bailey W. M. Co. v. Young, 12 Blatchf. 199.
[8] Rule 62.
[9] Daniell's Ch. Pr. (5th Am. ed.) 731.
[10] Peck v. Peck, Moseley, 45.
[11] Daniell's Ch. Pr. (5th Am. ed.) 731.
[12] Mitford's Pl., ch. 2, § 2, part 3; Story's Eq. Pl., § 870.
[13] Story's Eq. Pl. § 870; Rules 39, 44.
[14] Mitford's Pl., ch. 2, § 2, part 3.
[15] Mitford's Pl., ch. 2, § 2, part 3; Story's Eq. Pl., § 870.

and other persons under a disability, the reservation and general traverse have always been deemed properly omitted.[16] The answer in such cases generally is that the infant knows nothing of the matter, and therefore neither admits nor denies the charges, but leaves the plaintiff to prove them as he shall be advised, and throws himself on the protection of the court.[17] But if such a defendant has any substantive defense, he should plead the same.[18]

§ 151. Signature and oath to answer.— An answer must be signed by the defendant making it; even, it seems, when an answer under oath has been waived,[1] unless he answer by guardian, when the latter should sign it,[2] or unless an order has been obtained dispensing with such signature on account of the defendant's absence, or for some other reason.[3] A person answering in a dual capacity need sign but once.[4] An answer by a corporation must be under its corporate seal.[5] In such a case it is advisable to have the seal attested by one of the corporate officers.[6] When an answer is made without oath, the signature of the defendant should also be attested.[7] This is usually done by his solicitor.[8] The answer, unless it is taken by commissioners, should also be signed by counsel.[9] Unless an answer under oath is waived in the bill, the defendant, if a natural person, must swear;[10] or, "if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him."[11] The oath or affirmation may be taken before a justice or judge of any court of the United States, or before a commissioner appointed by a Circuit

[16] Story's Eq. Pl., § 871.

[17] Chancellor Kent in Mills v. Dennis, 3 J. Ch. (N. Y.) 367, 368.

[18] Holden v. Hearn, 1 Beav. 445, 455; Lane v. Hardwicke, 9 Beav. 148, 149.

§ 151. [1] Story's Eq. Pl., § 875; Davis v. Davidson, 4 McLean, 136; Bayley v. De Walkiers, 10 Ves. 441; Fulton Bank v. Beach, 2 Paige (N. Y.), 307; Denison v. Bassford, 7 Paige (N. Y.), 370.

[2] Anon., 2 J. & W. 553; Daniell's Ch. Pr. (5th Am. ed.) 733.

[3] Story's Eq. Pl., § 875; —— v. Lake, 6 Ves. 171; —— v. Gwillim, 6 Ves. 285.

[4] Anon., 2 J. & W. 553.

[5] Haight v. Proprietors Morris Aqueduct, 4 Wash. 601, 605; Daniell's Ch. Pr. (5th Am. ed.) 735, and note 2.

[6] Daniell's Ch. Pr. (5th Am. ed.) 735, note 2.

[7] Daniell's Ch. Pr. (5th Am. ed.) 738.

[8] Daniell's Ch. Pr. (5th Am. ed.) 738.

[9] Davis v. Davidson, 4 McLean, 136; Story's Eq. Pl., § 876.

[10] Fulton Bank v. Beach, 2 Paige (N. Y.), 307; Daniell's Ch. Pr. (5th Am. ed.) 735.

[11] Rule 91. See U. S. R. S., § 5013.

Court to take testimony or depositions, or before a master in chancery appointed by a Circuit Court, or before a judge of a court of a State or Territory;" or before a notary public, when acting within the limits of their respective jurisdictions.[12] An answer can be verified without the United States before commissioners appointed for that purpose;[13] or probably before any secretary of legation or consular officer at the post, port, place, or within the limits of his legation, consulate, or commercial agency.[14] The following form of oath or affirmation is given by Daniell in his valuable work on Chancery Practice: "You swear, or solemnly affirm, that what is contained in this your answer (or plea and answer), as far as concerns your own act and deed, is true to your own knowledge, and that what relates to the act and deed of any other person or persons, you believe to be true."[15] When sworn to in a foreign country, it seems that it must be "administered in the most solemn form observed by the laws and usages" of that country.[16] Every alteration and interlineation in the answer should be authenticated by the initials of the officer who administers "the oath." When the verification of an answer is in the form of an affidavit, the name of the defendant making it must be subscribed at the foot of the affidavit. When in the form of a certificate of the officer administering the oath, the defendant's name should be subscribed at the foot of the answer.[17]

§ 152. Motions to take answers off the file.— When an answer is in any respect irregular,[1] or is filed by a person not named as a defendant in the bill,[2] or is filed too late, it may upon the plaintiff's motion be taken off the file.[3] This may also be done when the paper purporting to be an answer is so evasive that it is in fact no answer.[4] If it is taken off the file for an error in form, the court may allow the same paper to

[12] Rule 59; L. 1876, ch. 304.

[13] Read v. Consequa, 4 Wash. 335.

[14] U. S. R. S., § 1750. But see Read v. Consequa, 4 Wash. 335.

[15] 2 Daniell's Ch. Pr., ch. 15, § 2, p. 270; Story's Eq. Pl., § 872, note 4.

[16] Read v. Consequa, 4 Wash. 335.

[17] Daniell's Ch. Pr. (5th Am. ed.) 743; Hathaway v. Scott, 11 Paige (N. Y.), 173, 176; Pincers v. Robertson, 9 C. E. Green (24 N. J. Eq.), 348.

§ 152. [1] Bailey W. M. Co. v. Young, 12 Blatchf. 199.

[2] Putnam v. New Albany, 4 Biss. 365, 367.

[3] Allen v. Mayor and Board of Ed., 18 Blatchf. 239.

[4] Tomkin v. Lethbridge, 9 Ves. 178; Smith v. Searle, 14 Ves. 415.

be corrected, and then filed anew.[5] By setting the cause down for a rehearing upon bill and answer, or by filing exceptions or the general replication, such a defect would be waived.[6] A failure to enter an order taking a bill as confessed, does not authorize the filing of an answer after the prescribed time.[7]

§ 153. Exceptions for insufficiency.— After an answer is filed on any rule-day, the plaintiff is allowed until the next rule-day to file in the clerk's office exceptions thereto for insufficiency, and no longer, unless a longer time is allowed for the purpose, upon cause shown to the court or a judge thereof; and if no exceptions are filed thereto within that period, the answer is deemed and taken to be sufficient.[1] The time may, however, under extraordinary circumstances, be abridged by the court.[2] The court may, to avoid delay, allow the bill to be amended, and exceptions to be filed at the same time to the answer to the original bill; requiring the defendant to at once answer the amended bill and the exceptions.[3] Exceptions to an answer for insufficiency can be filed after exceptions for impertinence have been filed and disposed of.[4] It seems that, if a plea is ordered to stand for an answer, without leave to except being granted in the order, no exception for insufficiency can be taken to so much of the answer as is covered by the plea;[5] and that where an answer is accompanied by a demurrer or plea to the discovery, and the complainant excepts to the answer before the other pleading has been disposed of, he thereby admits the latter to be good, and, if set down for argument, it may be stricken off the calendar.[6] In the latter case leave to withdraw the exceptions may be given.[7] No exceptions for insufficiency can be filed to the answer of an infant or other person under a disability.[8] It has been held that

[5] Bailey W. M. Co. v. Young, 12 Blatchf. 199.

[6] Fulton Bank v. Beach, 2 Paige (N. Y.), 307; Glassington v. Thwaites, 2 Russ. 458, 461.

[7] Allen v. Mayor, 7 Fed. R. 483.

§ 153. [1] Rule 61.

[2] Read v. Consequa, 4 Wash. 335.

[3] Kittridge v. Claremont Bank, 3 Story, 590.

[4] Patriotic Bank v. Bank of Washington, 5 Cranch, C. C. 602.

[5] Sellon v. Lewen, 3 P. Wms. 239.

[6] Brownell v. Curtis, 10 Paige (N. Y.), 210, 211; Mitf. Pl., ch. 2, § 2, part 3. See, however, Darnell v. Reyny, 1 Vern. 344.

[7] Boyd v. Mills, 13 Ves. 85.

[8] Copeland v. Wheeler, 4 Brown, Ch. C. 256; Lucas v. Lucas, 13 Ves. 274; Micklethwaite v. Atkinson, 1 Coll. 173; Daniell's Ch. Pr. (5th Am. ed.) 169.

exceptions will lie for insufficiency, and discovery may be required although an answer under oath is waived.[9] After exceptions for insufficiency have been filed, no new exceptions can regularly be added;[10] but leave to amend those on file may under special circumstances be obtained.[11] When defendants answer separately, separate exceptions should be filed to each answer.[12] Exceptions to an answer for insufficiency must be in writing,[13] and signed by counsel.[14] It seems that they must specify that the answer excepted to is an answer to the bill.[15] They should state the charges in the bill and the interrogatory applicable thereto, to which the exceptionable part of the answer should be addressed, and then state the terms of that part of the answer *verbatim*, so that the court, without searching the bill and answer throughout, may at once perceive the ground of the exception, and ascertain its sufficiency.[16] An exception to an answer, "because, in stating in the said answer what he has been informed of by the said Byam, he does not say whether he actually believes the same to be true," was said to be irregular in form.[17] Such an objection, or any irregularity in the form of an exception for insufficiency, can be raised by a motion to take the exception off the file.[18] By setting the exception down for a hearing, an objection for irregularity is waived.[19] Where exceptions have been filed to an answer for insufficiency, within the period prescribed, if the defendant do not submit to the same and file an amended answer on the next succeeding rule-day, the plaintiff should forthwith set them down for a hearing on the next succeeding

[9] Uhlmann v. Amholt & S. B. Co., 41 Fed. R. 369; Colgate v. Compagnie Francaise, 23 Fed. R. 82. But see United States v. McLaughlin, 24 Fed. R. 828; McCormick v. Chamberlin, 11 Paige (N. Y.), 543; Sheppard v. Akers, 1 Tenn. Ch. 826.

[10] Partridge v. Haycraft, 11 Ves. 570, 575.

[11] Dolder v. Bank of England, 10 Ves. 284; Bancroft v. Wentworth, 10 Vest. 285 n.; Northcote v. Northcote, 1 Dick. 22.

[12] Sydolph v. Monkston, 2 Dick. 609.

[13] Brooks v. Byam, 1 Story, 296; Yates v. Hardy, Jacob, 223; Woods v. Morrell, 1 J. Ch. (N. Y.) 103.

[14] Yates v. Hardy, Jacob, 223.

[15] Earl of Lichfield v. Bond, 5 Beav. 513.

[16] Brooks v. Byam, 1 Story, 298, 303; Bower-Barff R. I. Co. v. Wells R. I. Co., 43 Fed. R. 891.

[17] Brooks v. Byam, 1 Story, 298, 303.

[18] Yates v. Hardy, Jacob, 223; Williams v. Davies, 1 Sim. & S. 426.

[19] Brooks v. Byam, 1 Story, 298, 303.

rule-day thereafter, before a judge of the court, and should enter, as of course, in the order-book an order for that purpose; and if he do not so set down the same for a hearing, the exceptions are deemed abandoned, and the answer deemed sufficient; but the court, or any judge thereof, may, for good cause shown, enlarge the time for filing exceptions or for answering the same, in his discretion, upon such terms as he may deem reasonable.[20] It has been said that to refer such exceptions to a master on a day not a rule-day "is to do what is not authorized by the rules, and, unless affirmed or cured by some subsequent action of the court, is a nullity."[21] If, at the hearing, the exceptions are allowed, the defendant is bound to put in a full and complete answer thereto on the next succeeding rule-day; otherwise the plaintiff will, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed, or, at his election, he may have a writ of attachment to compel the defendant to make a better answer to the matter of the exceptions; and the defendant, when he is in custody upon such writ, cannot be discharged therefrom but by an order of the court, or of a judge thereof, upon his putting in such answer, and complying with such other terms as the court or judge may direct.[22] If, upon argument, the plaintiff's exceptions are overruled, or the answer adjudged insufficient, the prevailing party is entitled to all the costs thereby occasioned, unless otherwise directed by the court, or the judge thereof, at the hearing upon the exceptions.[23] An exception for insufficiency may be allowed in part and overruled in part.[24] Where an exception for insufficiency was sustained and a further answer put in, which the plaintiff deemed still insufficient, by the former English practice he had three weeks wherein to refer the same to a master upon the old exceptions; otherwise the further answer was deemed sufficient.[25] If the further answer was found insufficient, the defendant was required to put in a third answer; and if that too was found insufficient, he was committed to the Fleet, and examined upon interrogato-

[20] Rule 63.

[21] La Vega v. Lapsley, 1 Woods, 428, 432, Woods, J.

[22] Rule 64.

[23] Rule 65.

[24] E. I. Co. v. Campbell, 1 Ves. Sen. 247; Hoffmann v. Postill, L. R. 4 Ch. App. 673.

[25] Smith's Ch. Pr. (2d ed. 1836), 285.

ries.[26] When an order was obtained after answer, allowing the plaintiff to amend his bill, and requiring the defendant to answer the amendments and the exceptions to the answer to the original bill together; upon such answer the plaintiff could only file new exceptions for a failure to fully answer the amendments.[27] A further answer is in every respect similar, and is considered a part of the original answer. If, therefore, it repeats any matter contained in a former answer, the repetition, unless it varies the defense in point of substance, or is otherwise necessary, is considered as impertinent.[28] The criterion of the materiality of an interrogatory is not whether an affirmative answer will prove the bill, but whether it will tend to prove the bill.[29]

§ 154. Supplemental answers.— A supplemental answer is filed to bring to the attention of the court some fact which was not inserted in the original answer through mistake or ignorance,[1] or which has occurred subsequently to the filing of the same.[2] They can only be filed by leave of the court, which may impose terms upon the applicant.[3] The rules regulating supplemental answers of the former class will be found in the chapter upon Amendments. Those of the second class have been little considered in the books. Their functions may also be performed by cross-bills.[4] It is too late after answer and decree to object to the regularity of a proceeding in which facts were set up by petition when a cross-bill or supplemental answer would have been the proper practice.[5]

§ 155. Disclaimers.— A disclaimer is a pleading by which the defendant renounces all claim to property which the plaintiff seeks in his bill to obtain.[1] It is said that it is distinct in

[26] Smith's Ch. Pr. (2d ed. 1836), 285, 286.

[27] Partridge v. Haycraft, 11 Ves. 570, 581; Smith's Ch. Pr. (2d ed. 1836), 286.

[28] Story's Eq. Pl., § 868. See Gier v. Gregg, 4 McLean, 203.

[29] Uhlmann v. Amholt & S. B. Co., 41 Fed. R. 869. See *supra*, § 82.

§ 154. [1] Smith v. Babcock, 3 Sumner, 583; Williams v. Gibbes, 20 How. 535; Caster v. Wood, 1 Baldw. 289; Suydam v. Truesdale, 6 McLean, 459.

[2] Kelsey v. Hobby, 16 Pet. 269, 277; Talmage v. Pell, 9 Paige (N. Y.), 410, 413.

[3] Smith v. Babcock, 3 Sumner, 583; Caster v. Wood, 1 Baldw. 289.

[4] Kelsey v. Hobby, 16 Pet. 269, 277; *infra*, § 171.

[5] Kelsey v. Hobby, 16 Pet. 269, 277; Coburn v. Cedar V. L. & C. Co., 188 U. S. 196, 222.

§ 155. [1] Mounsey v. Burnham, 1 Hare, 15.

its substance from an answer, although sometimes confounded with one.[2] It must, however, in most cases be accompanied by an answer, for where a defendant has been made a party by mistake, having had an interest with which he has parted, the plaintiff may require an answer sufficient to ascertain what the facts are, and to whom he has transferred his interest.[3] Moreover, a defendant, although he may disclaim an interest, cannot disclaim a liability.[4] The only cases in which a disclaimer without an answer is sufficient seem to be those where the bill simply alleges that the defendant claims an interest in the property in question without specifying the claim.[5] Under very special circumstances, a disclaimer may be withdrawn, and an answer filed setting up a claim.[6] Where a disclaimer is made, and it appears that the defendant was made a party without apparent reason, the bill will be dismissed with costs.[7] Otherwise, a decree may be entered without costs against the defendant and all claiming under him since the filing of the bill.[8] The plaintiff should not file a replication to a disclaimer alone.[9] When the disclaimer is insufficient it may be stricken off the file upon motion, or exceptions to it for insufficiency, if filed, will be sustained.[10] A disclaimer may be accompanied by a plea, answer, or demurrer, or all of these, provided that each refers to a separate part of the bill.[11] If a disclaimer and answer by the same defendant are inconsistent, the matter will be taken most strongly against the defendant upon the disclaimer.[12] The following is a form of a mere disclaimer: "The disclaimer of Richard Flagg, the defendant, to the bill of complaint of Robert Aber, complainant. This defendant, saving and reserving to himself [here follows the usual general reservation in an answer], saith, that he doth not know that he, this defendant, to his knowledge and belief, ever had, nor did

[2] Story's Eq. Pl., § 838.

[3] Story's Eq. Pl., § 838. See Ellsworth v. Curtis, 10 Paige (N. Y.), 105; Carrington v. Lentz, 40 Fed. R. 18.

[4] Glassington v. Thwaites, 2 Russ. 458; Graham v. Coape, 9 Sim. 98, 102; s. c., 3 Myl. & Cr. 638.

[5] Story's Eq. Pl., § 838. See Graham v. Coape, 9 Sim. 98, 102; s. c., 3 Myl. & Cr. 638.

[6] Story's Eq. Pl., § 841.

[7] Story's Eq. Pl., § 842.

[8] Story's Eq. Pl., § 842.

[9] Story's Eq. Pl., § 842.

[10] Graham v. Coape, 9 Sim. 98, 102; s. c., 3 Myl. & Cr. 638.

[11] Story's Eq. Pl., § 839; Mitford's Pl., ch. 2, § 2, part 8.

[12] Mitford's Pl., ch. 2, § 2, part 2.

he claim or pretend to have, nor doth he now claim, any right, title, or interest of, in, or to the estates and premises, situate [describing them], in the said complainant's bill set forth, or any part thereof; and this defendant doth disclaim all right, title, and interest to the said estate and premises in [naming their situation], in the said complainant's bill mentioned, and every part thereof." A disclaimer concludes in the same way as an answer.[13]

[13] Story's Eq. Pl., § 844, note 6.

CHAPTER XI.

REPLICATIONS.

§ 156. Definition and history of replications.— A replication is a pleading by which the plaintiff puts in issue the matters pleaded in a defendant's answer or plea. No replication can be filed to a demurrer.[1] Replications were formerly of two kinds, general and special.[2] A general replication consists of a general denial of the truth of the defendant's plea or answer, and of the sufficiency of the matter alleged therein to bar the plaintiff's suit, together with an assertion of the truth and sufficiency of the bill.[3] A special replication sets up new matter in avoidance of a substantive defense contained in the answer or plea.[4] To this the defendant was obliged to file a rejoinder, giving the discovery required in it.[5] This might then be succeeded by a surrejoinder and a rebutter.[6] Special replications and their consequences were, on account of the inconvenience therefrom resulting, almost obsolete by the time of Lord Eldon.[7] A special replication to the answer is forbidden by the Equity Rules, which provide that "no special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without the payment of costs, as the court or a judge thereof may in his discretion direct."[8] It has been held, that a special replication is equally improper to a plea.[9] Allegations of new matter in a replication will therefore be disregarded, and the pleading, if allowed to remain upon the file, will be given no more effect than if it were simply general.[10] The proper course, however,

§ 156. [1] Mason v. Hartford, P. & F. R. Co., 10 Fed. R. 884.

[2] Mitford's Pl., ch. 8.

[3] Story's Eq. Pl., § 878.

[4] Story's Eq. Pl., § 878.

[5] Mitford's Pl., ch. 8; Story's Eq. Pl., § 878.

[6] Mitford's Pl., ch. 8; Story's Eq. Pl., § 878.

[7] Mitford's Pl., ch. 8; Story's Eq. Pl., § 878.

[8] Rule 45.

[9] Mason v. Hartford, P. & F. R. Co., 10 Fed. R. 884.

[10] Vattier v. Hinde, 7 Pet. 252, 278; Duponti v. Mussy, 4 Wash. 128; Wren v. Spencer O. Mfg. Co., 18 Off. Gaz. 857.

is for the defendant to move the special replication off the file.[11] After the disuse in England of special replications, it was customary for the plaintiff to sue out and serve upon the defendant a subpœna to rejoin.[12] This practice never prevailed generally throughout the United States;[13] and the Equity Rules provide that "in all cases where the general replication is filed, the cause shall be deemed to all intents and purposes at issue, without any rejoinder or other pleading on either side."[14]

§ 157. When a replication should be filed.—The Equity Rules provide that if the plaintiff does not reply to any plea, or set it down for argument on the rule-day when the same is filed, or on the next succeeding rule-day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for the purpose.[1] Whenever the answer of the defendant is not excepted to, or is adjudged or deemed sufficient, the plaintiff must file the general replication thereto on or before the next succeeding rule-day thereafter.[2] If the plaintiff omits or refuses to file such replication within the prescribed period, the defendant is entitled to an order, as of course, for a dismissal of the suit; and the suit is thereupon dismissed, unless the court, or a judge thereof, shall, upon motion for cause shown, allow a replication to be filed *nunc pro tunc*, the plaintiff submitting to speed the cause and to such other terms as may be directed.[3] It has been held that such an order may be entered by the clerk without any application to the judge.[4] No replication need or should be filed when the cause is set down for hearing upon bill and answer.[5] Where there are several defendants a replication should be filed within the prescribed time after one of them has filed an answer or plea, although the others may not have done so.[6] It is the safer practice to file a separate replication after the other answers have come in.[7] The court may grant leave to withdraw a rep-

[11] Mason v. Hartford, P. & F. R. Co., 10 Fed. R. 334.

[12] Story's Eq. Pl., § 879.

[13] Story's Eq. Pl., § 879, note 5.

[14] Rule 66.

§ 157. [1] Rule 33; Heyman v. Uhlman, 34 Fed. R. 686.

[2] Rule 66.

[3] Rule 66.

[4] Robinson v. Satterlee, 3 Saw. 134.

[5] Reynolds v. Crawfordsville First Nat. Bank, 112 U. S. 405; Gaines v. Agnelly, 1 Woods, 238.

[6] Coleman v. Martin, 6 Blatchf. 291.

[7] See Smith's Ch. Pr. (2d Eng. ed.), vol. i, p. 336.

lication, and amend, or have the cause set down for a hearing upon bill and answer.[8] It has been held that the pendency of a motion affecting the plea or answer will excuse the plaintiff from replying before the motion has been decided.[9] Only a party whose plea or answer has received no proper reply can have a bill dismissed for a failure to comply with these rules.[10] The court exercises great liberality in allowing a replication to be filed *nunc pro tunc*,[11] or in allowing one filed too late to stand.[12] The taking of testimony by the defendant, or any other proceeding taken by him in the cause, would probably be held a waiver of his right to have a bill dismissed for want of a replication.[13] An objection upon this ground cannot be raised for the first time upon appeal.[14] After a cause has been heard upon bill and answer, the court will rarely allow a replication to be filed.[15]

§ 158. Effect of a replication.— The complainant by filing a general replication admits the sufficiency as regards discovery,[1] and as regards the form of pleading,[2] but not the sufficiency as a defense,[3] of the plea or answer to which it is filed, and denies every allegation in the plea or answer which is not directly responsive to the bill.[4]

§ 159. Frame of a replication.— The full title of the cause, as it stands at the time the replication is filed, must be set forth

[8] Rogers v. Goore, 17 Ves. 130; Brown v. Ricketts, 2 J. Ch. (N. Y.) 425; Daniell's Ch. Pr. (2d Am. ed.) 479; Ibid. (3d Am. ed.) 830.

[9] Allis v. Stowell, 5 Fed. R. 203.

[10] Chicago & A. R. Co. v. Union R. M. Co., 109 U. S. 702, 717.

[11] Peirce v. West's Ex'rs, Pet. C. C. 351; Sayles v. Erie Ry. Co., 2 N. J. L. J. 212; Fischer v. Hayes, 6 Fed. R. 76; s. c., 19 Blatchf. 26; Jones v. Brittan, 1 Woods, 667.

[12] Fischer v. Hayes, 6 Fed. R. 76; s. c., 19 Blatchf. 26.

[13] Jones v. Brittan, 1 Woods, 667; Fischer v. Hayes, 6 Fed. R. 76; s. c., 19 Blatchf. 26; Reynolds v. Crawfordsville First Nat. Bank, 112 U. S. 405.

[14] Clements v. Moore, 6 Wall. 299; Fretz v. Stover, 22 Wall. 198.

[15] Bullinger v. Mackey, 14 Blatchf. 355; Peirce v. West's Ex'rs, Pet. C. C. 351.

§ 158. [1] Story's Eq. Pl., § 877; Hughes v. Blake, 6 Wheat. 453.

[2] McKim v. White Hall Co., 2 Md. Ch. 510.

[3] Equity Rule 33; Everts v. Agnes, 4 Wis. 343; Rule 33; Matthews v. Lalance & G. Mfg. Co., 2 Fed. R. 232. But see Myers v. Dorr, 13 Blatchf. 22; Theberath v. Rubber & C. H. T. Co., 5 Bann. & A. 584.

[4] Humes v. Scruggs, 94 U. S. 22. It was held that the general replication put in issue the validity of a deed set up in the answer although not questioned by the bill. Boyd v. Hawkins, 2 Dev. (N. C.) Eq. 195. But see McClane's Adm'x v. Shepherd's Ex'x, 21 N. J. Eq. 76; Cowart v. Perrine, 21 N. J. Eq. 101.

in the heading of the replication, but only the names of such of the defendants as have appeared should be inserted or referred to in the body. If a defendant's name has been misspelled by the plaintiff, and such defendant has corrected the same by his answer, but the plaintiff has not afterwards amended his bill with respect to such name, the correction should be shown in the title of the replication; in the body of the replication, however, the correct name only should be inserted. When any defendant has died since the bill was filed, the words "since deceased" should follow his name in the title, but his name should be omitted in the body of the replication. If the plaintiff joins issue with all the defendants their names need not be repeated in the body; it is sufficient in such case to designate them as "all the defendants;" but if he does not join issue with all, the names of the defendants must be set out in the body.[1] If the defendant has filed both a plea and answer, the replication should refer to both.[2] The body of a general replication is substantially as follows: "This repliant, saving and reserving to himself all and all manner of advantage of exception, which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendants, for replication thereunto, saith, that he doth and will aver, maintain, and prove his said bill to be true, certain, and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive, and insufficient in law, to be replied unto by this repliant; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed."[3] A replication should be signed by the plaintiff's solicitors. The signature of counsel is unnecessary.[4] A replication, like all other papers in a suit in equity, should contain

§ 159. [1] Daniell's Ch. Pr. (4th Am. ed.) 830, 831.

[2] Nicoll v. Wiseman, 2 Vern. 46.

[3] Story's Eq. Pl., § 878, note 4.

[4] Story's Eq. Pl., § 881; Daniell's Ch. Pr. (4th Am. ed.) 830.

no scandal or impertinence. Proceedings thereon on account of its containing scandalous or impertinent matter are similar to those upon an answer of that character. In Queen Elizabeth's time, the plaintiff, for putting in too long a replication, was fined ten pounds, and imprisoned, and a hole made through the replication, which was hung about his neck, while he was obliged to go thus carrying it from bar to bar.[5]

[5] Milward v. Welden, 8 Eliz. li. B., fo. 678; Tothill, 101.

CHAPTER XII.

AMENDMENTS.

§ 160. Amendments in general.—"In reference to amendments of equity pleadings the courts have found it impracticable to lay down a rule that would govern all cases. Their allowance must, at every stage of the cause, rest in the discretion of the court; and that discretion must depend largely on the special circumstances of each case. It may be said, generally, that in passing upon applications to amend, the ends of justice should never be sacrificed to technical rules of practice. Undoubtedly great caution should be exercised where the application comes after the litigation has continued for some time, or when the granting of it would cause serious inconvenience or expense to the opposite side."[1] The Revised Statutes provide that the court "may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."[2] States,[3] charities,[4] infants,[5] idiots, and lunatics, are allowed to amend in cases where courts might hesitate to grant the privilege to others.

§ 161. When bills can be amended.— The equity rules regulate the amendment of bills as follows: "The plaintiff shall be at liberty, as a matter of course, and without payment of costs, to amend his bill, in any matters whatsoever, before any copy has been taken out of the clerk's office, and in any small matters afterwards, such as filling blanks, correcting errors of dates, misnomer of parties, misdescription of premises, clerical errors, and generally in matters of form. But if he amend in a material point, as he may do of course, after a copy has been

§ 160. [1] Harlan, J., in Hardin v. Boyd, 113 U. S. 756, 761. See Nellis v. Pennock Mfg. Co., 38 Fed. R. 379.

[2] U. S. R. S., § 954.

[3] Rhode Island v. Massachusetts, 13 Pet. 23.

[4] President of St. Mary M. College v. Sibthorp, 1 Russ. 154.

[5] Serle v. St. Eloy, 2 P. Wms. 386; Pritchard v. Quinchant, Amb. 147; Story's Eq. Pl., §§ 59, 892.

so taken, before any answer or plea or demurrer to the bill, he shall pay to the defendant the costs occasioned thereby, and shall, without delay, furnish him with a fair copy thereof, free of expense, with suitable references to the places where the same are to be inserted. And if the amendments are numerous, he shall furnish in like manner to the defendant a copy of the whole bill as amended; and if there be more than one defendant, a copy shall be furnished to each defendant affected thereby."[1] For the purposes of this rule, an answer which has been held or admitted to be insufficient is, it seems, considered as no answer.[2] Where objections to the jurisdiction have been sustained without any general appearance, or any pleading by the defendant, the bill may always be amended.[3] In New York, it was held that, after an insufficient answer, the complainant could not amend by leaving out the defendant's name, thus discontinuing the suit without costs.[4] An amendment of a bill without payment of costs or service of a copy on the defendant may be withdrawn and does not then extend the defendant's time to plead.[5] After an answer, or plea, or demurrer is put in, and before replication, the plaintiff may, upon motion or petition, without notice, obtain an order from any judge of the court to amend his bill on or before the next succeeding rule-day, upon payment of costs or without payment of costs, as the court or a judge thereof may in his discretion direct. But after replication filed, the plaintiff shall not be permitted to withdraw it and to amend his bill, except upon a special order of a judge of the court, upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause.[6] This rule applies only where leave to amend is asked

§ 161. [1] Equity Rule 28.

[2] Daniell's Ch. Pr. (2d Am. ed.) 473. See Chase v. Dunham, 1 Paige (N. Y.), 572.

[3] Insurance Co. of N. A. v. Svendsen, 74 Fed. R. 846.

[4] Chase v. Dunham, 1 Paige (N. Y.), 572.

[5] Sheffield F. Co. v. Witherow, 149 U. S. 574, 576.

[6] Equity Rule 29; Gubbins v. Laughtenschlager, 75 Fed. R. 615.

before a demurrer or plea is allowed.[7] "If the plaintiff so obtaining any order to amend his bill after answer, or plea, or demurrer, or after replication, shall not file his amendments or amended bill, as the case may require, in the clerk's office on or before the next succeeding rule-day, he shall be considered to have abandoned the same, and the cause shall proceed as if no application for any amendment had been made."[8] "No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without the payment of costs, as the court or a judge thereof may in his discretion direct."[9] Such an amendment must be asked for whenever the plaintiff wishes to avoid and not merely deny a defense in the answer which has not been anticipated in the original bill.[10]

This rule does not require that the amendment set forth evidence, such as a judgment or decree, to establish any fact put in issue by the pleading.[11] If upon a hearing any demurrer or plea is allowed, the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill upon such terms as it shall deem reasonable.[12] When the plaintiff wishes to amend the bill after replication by the addition of new facts or charges, the regular practice is for him to apply for leave to withdraw his replication and amend.[13] After a case has been set down for a hearing upon the facts, and especially after such a hearing, an amendment which substantially changes the case made by the bill will rarely be granted.[14] But an amend-

[7] National Bank v. Carpenter, 101 U. S. 567, 568.

[8] Equity Rule 30.

[9] Equity Rule 45. See Southern Pac. R. Co. v. U. S., 168 U. S. 1.

[10] Wilson v. Stolley, 4 McLean, 275; Lant v. Manley (C. C. A.), 75 Fed. R. 627, 634; Piatt v. Vattier, 9 Pet. 405. Thus, where an answer to a bill for an injunction against the infringement of a patent set up a license, the complainant was not allowed to prove the abandonment of the license because the bill contained no allegation to that effect. Wilson v. Stolley, 4 McLean, 275. It was held in North Carolina, that, where a deed was pleaded in the answer together with averments of the facts upon which its validity depended, no amendment of the bill was needed to enable the plaintiff to attack the validity of the deed. Boyd v. Hawkins, 2 Dev. Eq. (N. C.) 195, 215.

[11] Southern Pac. R. Co. v. U. S., 168 U. S. 1.

[12] Equity Rule 35.

[13] Daniell's Ch. Pr. (2d Am. ed.) 479.

[14] The Tremolo Patent, 23 Wall. 518, 527; Gubbins v. Laughtenschlager, 75 Fed. R. 615; Bass, R. & G. v. Feigenspan, 82 Fed. R. 260.

ment may be allowed by the court at any time even after a final decree,[15] and after a decision upon an appeal. In the latter case ordinarily leave from the appellate court to apply for the amendment must be obtained;[16] but where a decree for plaintiff upon a bill and answer had been reversed and the cause remanded for further proceedings, it was held that the plaintiff might be allowed by the Circuit Court to amend his bill without leave of the court of review.[17] Pending an appeal from a decree after a hearing on the facts, an amendment of the bill which would require the introduction of new proofs will very rarely, if ever, be allowed.[18]

§ 162. Form and effect of amendment of a bill.— "Wherever leave to amend the bill is granted, it is more proper to file an amended bill than to interline the original bill, particularly if some of the defendants had before answered that bill."[1] "The rule is that the amended bill should state no more of the original bill than may be necessary to introduce, and to make intelligible, the new matter, which should alone constitute the chief subject of the bill. The reasons for this rule are obvious. Not only is the incorporating of the old bill into the amended bill unnecessary, but it increases the costs, and exposes the defendants, particularly those who have answered the original bill, to the trouble of searching out and separating the old from the new matter, at the peril of having their answer excepted to if any mistake should happen, and all the matter of the amended bill should not be answered."[2] Accordingly, an amended bill which was obnoxious to this rule was held impertinent.[3] It is the better practice for the counsel to sign the amendments, if they are not as to matters of mere form.[4] An amendment speaks as of the date of the original bill; and an

[15] The Tremolo Patent, 23 Wall. 518.

[16] Post v. Beacon, V. P. & El. Co. (C. C. A.), 89 Fed. R. 1, 6; Fitchburg R. Co. v. Nichols (C. C. A.), 85 Fed. R. 869.

[17] Am. Bell Tel. Co. v. U. S., 68 Fed. R. 542, 570; *infra*, § 168.

[18] In re Sanford F. & T. Co., 160 U. S. 247.

§ 162. [1] Peirce v. West's Ex'rs, 3 Wash. 354, 355.

[2] Ibid. In Alabama, where the amendment was inconsistent with the allegations in the original bill, which it did not correct or withdraw, the bill as amended was dismissed upon demurrer. Friedman v. Fennell, 94 Ala. 570, 10 S. R. 649.

[3] Peirce v. West's Ex'rs, 3 Wash. 354, 355.

[4] Daniell's Ch. Pr. (5th Am. ed.) 818.

amendment alleging the requisite difference of citizenship in the present tense will be presumed to refer to the date of the original bill and will sustain the jurisdiction.[5] The amendment of a bill is usually considered as an admission of the sufficiency of the answer as regards discovery;[6] but an amendment which merely brings in a new defendant does not have this effect;[7] and the court may, to prevent delay, entertain a motion to amend a bill in equity at the same time that exceptions to the answer are filed, and may then require the defendant to answer the amendments and the exceptions together.[8] An amendment of a bill, at least before answer, will not, it seems, dissolve an injunction previously granted.[9] It is, however, the usual and the safer practice to have a clause inserted in the order stating that the amendment may be made without prejudice to the injunction.[10] Unless otherwise provided in the order, it seems that an amendment of a bill will discharge all contempt proceedings previously instituted.[11] But it was held that an amendment of a bill may be allowed upon the hearing of an application for a preliminary injunction, whereupon it takes effect at once, and the hearing may proceed without an adjournment until after the issue of the new subpœna which the amendment necessitates.[12]

§ 163. What amendments to bills may be made.— "An amendment should rarely if ever be permitted where it would materially change the very substance of the case made by the bill, and to which the parties have directed their proofs."[1] It

[5] Birdsall v. Perego, 5 Blatchf. 251; Baltimore & O. R. Co. v. McLaughlin (C. C. A.), 78 Fed. R. 519. Where an amended bill recited the substance of the original and made the same a part thereof, it was held that a corporation made a party to the original was a party to the amended bill. Empire C. & Tr. Co. v. Empire C. & M. Co., 150 U. S. 159.

[6] Smith's Ch. Pr. (2d Eng. ed.) 307.

[7] Taylor v. Wrench, 9 Ves. 315.

[8] Kittredge v. Claremont Bank, 3 Story, 590.

[9] Read v. Consequa, 4 Wash. 174, 180; Smith's Ch. Pr. (2d Eng. ed.), 306; Daniell's Ch. Pr. (5th Am. ed.) 424, 425.

[10] Read v. Consequa, 4 Wash. 174; Daniell's Ch. Pr. (5th Am. ed.) 424, 425.

[11] Smith's Ch. Pr. (2d Eng. ed.) 305; Gray v. Campbell, 1 R. & M. 323; Symonds v. Duchess of Cumberland, 2 Cox, 411.

[12] American S. W. Co. v. Wire D. & D. W. Unions, 90 Fed. R. 598.

§ 163. [1] Harlan, J., in Hardin v. Boyd, 113 U. S. 756, 761. Thus, where a bill for the enforcement of a judgment lien upon certain property was filed against certain specified defend-

is unsettled whether a bill for discovery can be amended so as also to pray relief.[2] It was held that a bill filed against persons in their individual capacity cannot be amended so as to sue

ants, an amendment was refused after a hearing, when it was sought to seek discovery and relief against all purchasers of both the property referred to in the original bill and other property of the judgment debtor. Sneed v. McCoull, 12 How. 407, 422. A bill to restrain the infringement of a patent cannot be amended so as to allege that the title to the patent is in a different person from the one who in the original bill is alleged to hold it. Goodyear v. Bourn, 3 Blatchf. 266. See Rylands v. La Touche, 2 Bligh, 586. But see Owatonna Mfg. Co. v. F. B. Fargo & Co., 94 Fed. R. 519; *infra*, § 164. Such a bill may, however, be amended so as to set up a reissue of the original patent, which occurred before the original bill was filed, but was not mentioned therein. The Tremolo Patent, 23 Wall. 518; Reay v. Raynor, 19 Fed. R. 308; Reay v. Berlin & J. E. Co., 30 Fed. R. 448. But see Jones v. Barker, 11 Fed. R. 597. And so as to include claims for damages and profits due previous owners of the patent, who have assigned them to the complainant. N. Y. Grape S. Co. v. Buffalo Grape S. Co., 20 Fed. R. 505. The allegation that certain machines alleged to be used in violation of a patent were infringements when made, may also be added by amendment. Reay v. Raynor, 19 Fed. R. 308. It was held that a bill for a new trial of an action for the price of stock alleged to have been sold the defendant could not be changed by amendment so as to charge that the defendant held the stock in trust for the complainant. Oglesby v. Attrill, 14 Fed. R. 214. A bill filed by several creditors praying the sale of their debtor's land in one State, and the satisfaction of their claims out of the proceeds of such sale, cannot be changed by amendment so as to pray relief to one against another of the plaintiffs, in respect to the receipt by the latter of the proceeds of the sale of other land of the same debtor situated in another State, and sold under a decree in another suit in another court. Smith v. Woolfolk, 115 U. S. 143, 148. A bill by the Land Company of New Mexico to enforce an executory contract by the defendant Smoot for the sale of an interest in land of which the defendant Elkins had the legal title, and which it was alleged that Smoot was about to assign to the defendant Butler with Elkins's connivance, was held not amendable "by omitting all the parties but Elkins, and proceeding against him upon the theory that complainant had acquired Smoot's interest by an absolute and unconditional transfer." Land Co. of New Mexico v. Elkins, 20 Fed. R. 545. A bill to set aside a sheriff's sale may be amended so as to add a tender of the purchase price and a prayer for a redemption of property. Graffam v. Burgess, 117 U. S. 180. A bill to set aside a contract for the sale of land as obtained by fraud may be amended by the addition of an alternative prayer for the specific performance of the contract. Hardin v. Boyd, 113 U. S. 756, distinguishing Shields v. Barrow, 17

[2] See Horsburg v. Baker, 1 Pet. 232; Butterworth v. Bailey, 15 Ves. 358; Hildyard v. Cressy, 3 Atk. 303; Crow v. Tyrell, 2 Madd. 397; Jackson v. Strong, 1 McClel. 245; Lousada v. Templer, 2 Russ. 565; Daniell's Ch. Pr. (2d Am. ed.) 463–465.

them as officers of a corporation.[3] A cross-bill may be amended so as to radically change the ground of the relief sought, when the proofs which make the amendment necessary have been furnished by the complainant in support of the latter's original bill.[4] When the suit was begun in a Federal court, that court may allow an amendment setting forth the facts essential to the Federal jurisdiction.[5] Allegations in a *remittitur* filed after judgment cannot be considered as amendments to the pleading.[6] Great liberality is allowed as to amendments which strike out parties,[7] or bring in new parties,[8] except as to bills for discovery, to which in England no new parties could be added.[9] A bill filed by a married woman can almost always be amended by the addition of the name of a next friend when necessary.[10] A bill filed on behalf of one's self and others may be amended by striking out the invitation to others to join, provided none of them have come in;[11] and a bill filed in one's own name

How. 130. A bill to remove a cloud upon the title to land may be amended so as to seek the enforcement of trusts relating to the same property. Partee v. Thomas, 11 Fed. R. 709. See also Neale v. Neales, 9 Wall. 1; Battle v. Mutual Life Ins. Co., 10 Blatchf. 417; Burgess v. Graffam, 10 Fed. R. 216. But see Savage v. Worsham, 104 Fed. R. 80. It has been said that where the bill originally sets out one agreement which it seeks to enforce, and the answer admits the execution of another agreement of a similar character, but with provisions different from those alleged in the bill, the plaintiff may amend, abandoning the agreement first pleaded by him, and obtain the enforcement of that admitted by the defendant; but that he cannot, while still praying the enforcement of the agreement as set out by him, amend so as to seek, in case he fail in proving that, an enforcement of the one admitted in the answer. Lindsay v. Lynch, 2 Sch. & Lef. 1, 9. It was held that a creditor's bill, filed to obtain the appointment of a receiver of the property of a city, and the application by him of its assets to the satisfaction of its debts, could not be amended so as to seek relief against a receiver and back-tax collector, appointed by a subsequent statute of the State to collect the city's assets. Meriwether v. Garrett, 102 U. S. 472, 502. But see Richmond v. Irons, 121 U. S. 27.

[3] Tyler v. Galloway, 13 Fed. R. 477. But see Womersley v. Merritt, L. R. 4 Eq. 695; Richmond v. Irons, 121 U. S. 27; Pendery v. Carleton, 87 Fed. R. 41.

[4] Chicago, M. & St. P. Ry. Co. v. Third Nat. Bank, 134 U. S. 276, 289.

[5] Continental Ins. Co. v. Rhoads, 119 U. S. 237; Halsted v. Buster, 119 U. S. 341; Denny v. Pironi, 141 U. S. 121, 124.

[6] Denny v. Pironi, 141 U. S. 121.

[7] Conolly v. Taylor, 2 Pet. 556; Dwight v. Humphreys, 3 McLean, 104.

[8] Fisher v. Rutherford, Baldwin, 188; Patterson v. Stapler, 7 Fed. R. 210.

[9] Marquis Cholmondeley v. Lord Clinton, 2 Meri. 71.

[10] Douglas v. Butler, 6 Fed. R. 228.

[11] Yates v. Arden, 5 Cranch C. C. 526.

may be amended by the addition of words sufficient to make it a bill in behalf of a class.[12] A bill filed against a defendant as executor may be amended so as to charge him as administrator of the same person.[13] In an English case, a bill in behalf of a charity was changed by amendment into an information.[14]

§ 164. Amendment by pleading matters subsequent to the filing of the bill.— The general rule is that nothing which has occurred since the filing of a bill can be added to it by amendment.[1] Such matters, when admissible, should ordinarily be introduced by a supplemental bill.[2] It was held incompetent to amend a bill, stating that certain notes and mortgages were executed under a threat by the defendant that he would kill the complainant if they were not executed and paid at their maturity, by adding the allegation, "that in pursuance of such threat the defendant did, subsequently to the commencement of this suit, take the life of the original complainant."[3] Such a murder does not add to the complainant's cause of action, although it might be put in evidence as tending to prove the original duress.[4] An amendment therefore speaks as of the date of the original bill. A bill may perhaps be amended before answer, demurrer, or plea, by alleging new matter that has occurred since it was first filed.[5] And it has been held that where a plaintiff has, at the time of filing his original bill, an inchoate right, to perfect which a formal act alone is necessary, and such formal act is not performed till afterwards; as where an executor files a bill before probate, and subsequently proves the testament,[6] or the next of kin files a bill to protect the personal estate of an intestate and subsequently procures her appointment as administratrix,[7] or a foreign ad-

[12] Richmond v. Irons, 121 U. S. 27; Good v. Blewitt, 13 Ves. 397, 401; Atty. Gen. v. Newcombe, 14 Ves. 1, 6; Reese R. S. Min. Co. v. Atwell, L. R. 7 Eq. 347.

[13] Randolph v. Barrett, 16 Pet. 138.

[14] President of St. Mary M. College v. Sibthorp, 1 Russ. 154.

§ 164. [1] Wray v. Hutchinson, 2 Myl. & K. 235; Mason v. Hartford, P. & F. R. Co., 10 Fed. R. 834; Copen v. Flesher, 1 Bond, 440; Lyster v. Stickney, 12 Fed. R. 609.

[2] See ch. XIV.

[3] Lyster v. Stickney, 12 Fed. R. 609, 610.

[4] Lyster v. Stickney, 12 Fed. R. 609.

[5] Story's Eq. Pl., § 885; Candler v. Pettit, 1 Paige (N. Y.), 168; Ogden v. Gibbons, Halst. N. J. Dig. 172.

[6] Belloat v. Morse, 2 Hayw. (N. C.) 157; Daniell's Ch. Pr. (2d Am. ed.) 460.

[7] Humphreys v. Humphreys, 3 P. Wms. 348; Bradford v. Felder, 2 M'Cord (S. C.), Ch. 170. See Person v. Fidelity & Casualty Co. (C. C. A.),

ministrator files a bill before obtaining ancillary letters of administration, and such letters are subsequently issued to him;[8] the introduction of the fact by amendment will be permitted.[9] It has been also held in England that the "defendant, when he puts in his answer, must state the facts as they *then* are; and if circumstances are then introduced in the answer which occurred subsequent to the filing of the bill, the plaintiff must be allowed to make amendments to the bill, so as to show that such new circumstances mentioned in the answer are not of the color he represents them, and so as to obtain a complete answer as to such circumstances."[10]

§ 165. Proceedings upon an amended bill.—When the amendment merely brings in new parties defendant, they alone need be served with a new subpœna.[1] If, however, a bill is substantially amended by the addition of new charges, according to the English practice a subpœna to answer the amendments had to be sued out and served upon all the defendants.[2] Where the bill is amended before answer or plea, no matter how trivial the amendment may be, the defendant may demur to it, although a demurrer to the original bill has been overruled.[3] Where, before answer, the bill is amended in a material point, the time to answer is extended to the same time as if the amended were an original bill.[4] If, however, a defendant has answered the original bill, he cannot, without obtaining leave

92 Fed. R. 965; reversing s. c., 84 Fed. R. 759.

[8] Swatzel v. Arnold, Woolw. 338; Black v. Henry G. Allen Co., 42 Fed. R. 618, 624; Hodges v. Kimball (C. C. A.), 91 Fed. R. 845. *Contra*, Mason v. Hartford, P. & F. R. Co., 10 Fed. R. 334.

[9] Daniell's Ch. Pr. (2d Am. ed.) 460, 461; Swatzel v. Arnold, Woolw. 338; Black v. Henry G. Allen Co., 42 Fed. R. 618, 624; Humphreys v. Humphreys, 3 P. Wms. 348. Where a bill for infringement was filed by the owner of the exclusive right to make and sell a patented article in the United States, he was allowed to show by a supplemental bill that pending the suit the patent had been assigned to him. Owatonna Mfg. Co. v. F. B. Fargo & Co., 94 Fed. R. 519. But it has been held that a defective creditor's bill cannot be amended by setting up a judgment obtained after it was filed. Putney v. Whitmore, 66 Fed. R. 385.

[10] Sir Thomas Plumer, V. C., in Knight v. Matthews, 1 Madd. 566.

§ 165. [1] Longworth v. Taylor, 1 McLean, 514; Angerstein v. Clarke, 1 Ves. Jr. 250; Skeffington v. ——, 4 Ves. 66.

[2] Cooke v. Davies, T. & R. 309; Bramston v. Carter, 2 Sim. 458. See Kendall v. Beckett, 1 Russ. 152.

[3] Bosanquet v. Marsham, 4 Sim. 573; Bancroft v. Warden, 2 Dick. 672.

[4] Nelson v. Eaton, 66 Fed. R. 376.

to withdraw his first answer, demur, plead, or answer to any more than the new matter, unless the amendments virtually make a new case.[5] For if the answer which still remains upon the record applies to any part of the amended bill, it will overrule a general demurrer.[6] Where the amendments seek to introduce new matter which is properly the subject of a supplemental bill, the defendant must raise that objection by demurrer,[7] plea, or answer.[8] Otherwise, the objection will be waived.[9] The equity rules provide that, "In any case where an amendment shall be made after answer filed, the defendant shall put in a new answer or supplemental answer on or before the next succeeding rule-day after that on which the amendment or amended bill is filed, unless the time is enlarged or otherwise ordered by a judge of the court; and upon his default, the like proceedings may be had as in cases of an omission to put in an answer."[10] An answer to an amended bill is impertinent if it contains any matter which was pleaded in the answer to the bill before amendment.[11] It seems to have been the English rule that an answer to an amended bill might set up an entirely new defense inconsistent with that in his former answer.[12] The court may after amendment refuse leave to file an answer which does not plead a defense to the new matter.[13]

§ 166. Amendments of demurrers, pleas, and replications. The court may allow a demurrer to be amended as to matters of form,[1] and also in substance by narrowing[2] its extent, and otherwise. When a substantial amendment of a demurrer is allowed, it is customary to give the plaintiff leave to amend his bill at the same time.[3] An amendment of a plea, except as to a matter of form,[4] is less frequently allowed; and only upon

[5] Keene v. Wheatley, 9 Am. Law Reg. 33, 60; Atkinson v. Hanway, 1 Cox Eq. 360; Ellice v. Goodson, 3 M. & C. 653; Ritchie v. Aylwin, 15 Ves. 79.

[6] Ellice v. Goodson, 3 M. & C. 653.

[7] Brown v. Higden, 1 Atk. 291.

[8] Wray v. Hutchinson, 2 M. & K. 235.

[9] Archbishop of York v. Stapleton, 2 Atk. 136.

[10] Equity Rule 46.

[11] Gier v. Gregg, 4 McLean, 202.

[12] Daniell's Ch. Pr. (2d Am. ed.) 468; citing Bolton v. Bolton, MS. See also Trust & F. Ins. Co. v. Jenkins, 8 Paige (N. Y.), 589.

[13] Chicago, M. & St. P. Ry. Co. v. Third Nat. Bank, 134 U. S. 276, 289.

§ 166. [1] U. S. R. S., § 954.

[2] Gregg v. Legh, 4 Madd. 193, 207; Atwill v. Ferrett, 2 Blatchf. 39, 49; Baker v. Mellish, 11 Ves. 70; Story's Eq. Pl., § 894.

[3] Gregg v. Legh, 4 Madd. 193, 207; Atwill v. Ferrett, 2 Blatchf. 39, 49.

[4] U. S. R. S., § 954.

an application in which the court must be told precisely what the amendment is to be, and how the slip happened which it is to correct.[5] In such a case, the defendant is usually given a very short time within which to amend.[6] The amendment of a replication will almost always be allowed.[7]

§ 167. Amendment of answers.— The equity rule affecting the amendment of answers is as follows: "After an answer is put in, it may be amended, as of course, in any matter of form, or by filling up a blank, or correcting a date, or reference to a document, or other small matter, and be resworn at any time before a replication is put in, or the cause set down for hearing upon bill and answer. But after replication, or such setting down for hearing, it shall not be amended in any material matters, as by adding new matters, facts, or defenses, or qualifying or altering the original statements, except by special leave of the court, or of a judge thereof, upon motion and cause shown, after due notice to the adverse party, supported, if required, by affidavit; and in every case where leave is so granted, the court or the judge granting the same may, in his discretion, require that the same be separately engrossed, and added as a distinct amendment to the original answer, so as to be distinguishable therefrom."[1] The principles upon which the courts proceed in allowing such amendments is thus stated by Judge Story: "In mere matters of form, or mistakes of dates, or verbal inaccuracies, courts of equity are very indulgent in allowing amendments. But when application is made to amend an answer in material facts, or to change essentially the grounds taken in the original answer, courts of equity are exceedingly slow and reluctant in acceding to it. To support such applications, they require very cogent circumstances, and such as to repel the notion of any attempt of the party to evade the justice of the cause, or to set up new and ingeniously contrived defenses or subterfuges. When the object is to let in new facts and defenses wholly dependent upon parol evidence, the reluctance of the court is greatly increased, since it has a natural tendency to encourage carelessness and indifference in making answers, and leaves much room for the introduction of testimony manufactured for the occasion. But when the new facts sought

[5] Story's Eq. Pl., § 895. See Giant P. Co. v. Safety N. P. Co., 19 Fed. R. 509.

[6] Story's Eq. Pl., § 895.

[7] Daniell's Ch. Pr. (4th Am. ed.) 831.

§ 167. [1] Equity Rule 60.

to be introduced are written papers or documents, which have been omitted by accident or mistake, there the same reason does not apply in its full force; for such papers and documents cannot be made to speak a different language from that which originally belonged to them. The whole matter rests in the sound discretion of the court."[2] "It seems to me that before any court of equity should allow such amended answers, it should be perfectly satisfied that the reasons assigned for the application are cogent and satisfactory; that the mistakes to be corrected, or the facts to be added, are made highly probable, if not certain; that they are material to the merits of the case in controversy; that the party has not been guilty of gross negligence; and that the mistakes have been ascertained, and the new facts have come to the knowledge of the party, since the original answer was put in and sworn to. Where the party relies upon new facts which have come to his knowledge since the answer was put in, or where it is manifest that he has been taken by surprise, or where the mistake or omission is manifestly a mere inadvertence and oversight, there is generally less reason to object to the amendment than there is where the whole bearing of the facts and evidence must have been well known before the answer was put in."[3] An amendment of an answer changing the character of the defense will rarely be allowed after the court has rendered an opinion adverse to the position originally taken by the defendant. The defendant will rarely be allowed to withdraw an admission which he has made.[5] Leave to amend will be denied when the complainant proves by affidavit that the new matter sought to be introduced is false.[6] Ordinarily, leave to amend an answer will be denied when the defendant knew of the facts which he wishes to introduce, at the time his original answer was drawn;[7] or might have then discovered them

[2] Smith v. Babcock, 3 Sumn. 583, 586.

[3] Smith v. Babcock, 3 Sumn. 583, 586; N. Y. Filter Co. v. O. H. Jewett F. Co., 62 Fed. R. 582.

[4] Calloway v. Dobson, 1 Brock. 119; Gubbins v. Laughtenschlager, 75 Fed. R. 615; Claflin v. Bennett, 51 Fed. R. 693, 701. See Walden v. Bodley, 14 Pet. 156; Hamilton v. Nevada G. & S. M. Co., 33 Fed. R. 562, 568.

[5] Ruggles v. Eddy, 11 Blatchf. 524.

[6] Hicks v. Otto, 17 Fed. R. 539.

[7] India R. C. Co. v. Phelps, 8 Blatchf. 85; Webster L. Co. v. Higgins, 13 Blatchf. 349; Cross v. Morgan, 6 Fed. R. 241; Suydam v. Truesdale, 6 McLean, 459.

by the exercise of reasonable diligence.[8] An omission due to a mistake of law cannot ordinarily be cured by amendment.[9] The court may refuse to allow an amendment which would introduce an unconscientious defense, such as the statute of limitations,[10] the statute of frauds,[11] or that a contract made by a complainant corporation was not authorized by its charter.[12] When the proposed amendment is trivial the answer may be removed from the file, altered, resworn to, and refiled;[13] but if it is of any length, it is customary to file a supplemental answer setting it forth.[14] Leave to withdraw an answer and file a demurrer or plea may [15] but very rarely will be granted.[16]

§ 168. Practice in obtaining leave to amend.— The application for leave to amend must be in writing, stating the new matter which the applicant desires to introduce by amendment, and must be supported by an affidavit, stating the reason why this matter was not included in the original pleading.[1] Where the former pleading was verified, oath must be made to the truth of the proposed amendments.[2] Where the proposed amendment consists of matters disclosed by documentary evidence, the documents themselves must be produced if possible.[3] The court may impose costs in other terms as a condition precedent to amendment; for example, a disclosure of the names of the witnesses whom the party expects to call to prove the new matter.[4] When a motion for leave to amend is made after a demurrer, it is usual to grant the application on payment of

[8] India R. C. Co. v. Phelps, 8 Blatchf. 85; Webster L. Co. v. Higgins, 13 Blatchf. 349.

[9] Webster L. Co. v. Higgins, 13 Blatchf. 349; Cross v. Morgan, 6 Fed. R. 241.

[10] Cook v. Evans, 9 Yerg. (Tenn.) 287.

[11] Cook v. Bee, 2 Tenn. Ch. 344.

[12] Third Av. Sav. Bank v. Dimock, 9 C. E. Green (24 N. J. Eq.), 26.

[13] Bailey W. Mach. Co. v. Young, 12 Blatchf. 199.

[14] Dolder v. Bank of England, 10 Ves. 284, 285; Daniell's Ch. Pr. (5th Am. ed.) 779, 780.

[15] U. S. v. Am. Bell Tel. Co., 39 Fed. R. 716.

[16] Phelps v. Elliott, 30 Fed. R. 396.

§ 168. [1] Snead v. M'Coull, 12 How. 407, 422; Mer. Nat. Bank v. Carpenter, 101 U. S. 567, 568; Wells v. Wood, 10 Ves. 401; Nabob of the Carnatic v. East India Co., 1 Ves. Jr. 374, 385; Rodgers v. Rodgers, 1 Paige (N. Y.), 424; Daniell's Ch. Pr. (5th Am. ed.) 781.

[2] Rodgers v. Rodgers, 1 Paige (N. Y.) 424.

[3] Churton v. Frewen, L. R. 1 Eq. 238; Daniell's Ch. Pr. (5th Am. ed.) 781.

[4] Caster v. Wood, 1 Baldw. 289.

the costs to date, but not to require the payment of a docket fee unless the demurrer has been argued; and it is usual not to pass upon the demurrer when such leave is requested.[5] The order allowing the amendment should state the new matter to be inserted.[6] If the amended pleading states new matter not allowed by the order, it may be stricken from the file.[7] An objection that an amended bill contains matter which should have been pleaded in a supplemental bill is waived if not set up by demurrer, plea or answer.[8] The court upon appeal will disregard an amended pleading filed without leave,[9] unless the other party has treated it as valid, when he cannot raise the objection for the first time upon appeal.[10] When both parties have conducted the case as if the pleadings contained certain allegations therein omitted, an amendment inserting such allegations may be allowed at almost any stage of the cause.[11] Where the record on appeal shows that an amended bill which omitted one of the original parties was filed by leave of the court, it will be presumed that leave to dismiss as to such party was granted when there is nothing in the record to show the contrary.[12] An appellate court may,[13] but rarely[14] will, reverse a decree for an error in refusing permission to make an amendment; never unless the proposed amendment appears upon the record.[15] It has been said that a decree will not be reversed for an error in allowing amendments.[16] A Federal appellate court will not allow a pleading to be amended upon appeal to it,[17] except by consent.[18] But it was held that a Circuit Court had power to allow an amendment when hearing an appeal from a District Court.[19]

[5] Edison El. L. Co. v. Mather El. Co., 53 Fed. R. 244.

[6] Daniell's Ch. Pr. (5th Am. ed.) 410.

[7] Strange v. Collins, 2 V. & B. 163, 167.

[8] Seattle & S. & E. Ry. Co. v. Union Tr. Co., 79 Fed. R. 179.

[9] Terry v. McLure, 103 U. S. 442.

[10] Clements v. Moore, 6 Wall. 299.

[11] Tremolo Patent, 23 Wall. 518.

[12] Hicklin v. Marco (C. C. A.), 56 Fed. R. 549.

[13] Riddle v. Whitehill, 135 U. S. 621, 627, 640; Lant v. Manley, 75 Fed. R. 634.

[14] Mer. Nat. Bank v. Carpenter, 101 U. S. 567, 568; Hudson v. Randolph (C. C. A.), 66 Fed. R. 216.

[15] National Bank v. Carpenter, 107 U. S. 567, 568.

[16] Chapman v. Barney, 129 U. S. 677, 681.

[17] Pacific R. Co. of Mo. v. Ketchum, 95 U. S. 1.

[18] Kennedy v. Georgia State Bank, 9 How. 586.

[19] Warren v. Moody, 9 Fed. R. 673.

CHAPTER XIII.

CROSS-BILLS.

§ 169. Definition and origin of cross-bills.— A cross-bill is a bill filed by a defendant in a suit in equity against one or more of the other parties, in order to obtain either discovery of facts in aid of his defense, or complete relief to all parties as to the matters charged in the original bill.[1] It was borrowed through the canon, from the *reconventio* of the later civil law;[2] and from it is derived the counterclaim of code-pleading.[3] It was originally used chiefly for the purpose of set-off and discovery, which modern statutory enactments have made it now possible to obtain in a simpler way.

§ 170. When a cross-bill should be filed.— A cross-bill is filed by one of the defendants to a suit in equity either for his own protection, or by the direction of the court at the hearing, if the pleadings are then insufficient to enable it to determine the rights of all the parties sufficiently to make a complete decree upon the subject-matter of the suit.[1] This latter case most

§ 169. [1] Nelson, J., in Ayres v. Carver, 17 How. 591, 595; Springfield M. Co. v. Barnard (C. C. A.), 81 Fed. R. 261.

[2] Story's Eq. Pl., § 402; Langdell's Eq. Pl., §§ 152, 154.

[3] See Brande v. Gilchrist, 18 Fed. R. 465.

§ 170. [1] Langdell's Eq. Pl., § 124; Daniell's Ch. Pr. (5th Am. ed.) 1550; Field v. Schieffelin, 7 J. Ch. (N. Y.) 250. Where a bill was filed to restrain a sale under an execution, the defendant was allowed to file a cross-bill praying a decree, declaring that he had a lien upon the property on which he had levied, appointing a receiver, and directing the sale of such property. Chicago, M. & St. P. Ry. Co. v. Third Nat. Bank, 134 U. S. 276. See Remer v. McKay, 88 Fed. R. 164. Where the mortgagee filed a bill to collect rents from a lessee and a sub-lessee of the mortgaged railroad, and for a declaration that the lease was binding upon the sub-lessee, a cross-bill by the lessee against the mortgagor, who was a defendant to the original, seeking a cancellation of the lease, was held properly filed. Jesup v. Illinois Cent. R. Co., 43 Fed. R. 483. It has been held that a cross-bill may be filed in a suit to foreclose a mechanic's lien, for the cancellation of the record of the lien, with damages for a breach of the mechanic's contract (Springfield M. Co. v. Barnard S. Mfg. Co., 81 Fed. R. 261); in a suit to foreclose a vendor's lien, for the foreclosure of a subsequent vendor's lien after the cross-complainant has secured the payment of the amount

frequently happens when persons in opposite interests are co-defendants. Although a defendant can by his answer obtain the benefit of any defense he may have against the plaintiff's claim, he can, except in a very few cases, obtain no relief against the latter in the same suit beyond what results necessarily from the denial of the prayer of the original bill.[2] "If the facts which a defendant wishes to set up destroy the plaintiff's apparent cause of action, they constitute a defense, and should be set up by answer or plea; but if they only furnish a reason why the court should make a decree depriving the plaintiff of his cause of action, they must be set up by a cross-bill; and in the latter case the defendant's answer to the original bill should strictly contain nothing but discovery."[3] Where the plaintiff's right depends upon an instrument or conveyance which is not void, but merely voidable on account of fraud, or otherwise, the defendant can in most cases only set up the facts showing its invalidity by a cross-bill.[4] So where the defendant claims that a contract upon which the plaintiff relies does not express the true agreement between the parties, he must, except

due the original plaintiff (Cox v. Price (Va.), 22 S. E. R. 512); in a suit for the cancellation of a lease for the return of property delivered thereunder (Pullman's P. C. Co. v. Central Tr. Co., 171 U. S. 138); in a suit by a street railway company to enjoin a city from forfeiting a franchise, by a mortgagee for the appointment of a receiver to borrow the funds needed for payment to prevent the forfeiture. Union Street Ry. Co. v. City of Saginaw (Mich.), 73 N. W. R. 243. Where an insurance company had procured an injunction against a suit upon a policy which contained a limitation clause, the court sustained a cross-bill for a recovery of the amount of the policy on the ground that a State court of common law might hold that the injunction did not extend the period for bringing suit. North B. & M. Ins. Co. v. Lathrop (C. C. A.), 63 Fed. R. 508.

[2] Carnochan v. Christie, 11 Wheat. 446; Ford v. Douglas, 5 How. 143; Chapin v. Walker, 6 Fed. R. 794; Brande v. Gilchrist, 18 Fed. R. 465; Denver & R. G. Ry. Co. v. Denver, S. P. & P. R. Co., 17 Fed. R. 867; Lewis v. Glass, 92 Tenn. 147; s. c., 20 S. W. R. 571.

[3] Langdell's Eq. Pl., § 155.

[4] Ford v. Douglas, 5 How. 143; Langdell's Eq. Pl., § 131; Jacobs v. Richard, 18 Beav. 300; Beddoes v. Pugh, 26 Beav. 407, 416, 417; Holderness v. Rankin, 2 De Gex, F. & J. 258; Eddleston v. Collins, 3 De Gex, M. & G. 1, 16; Chapin v. Walker, 2 McCrary, 175; Manley v. Mickle, 55 N. J. Eq. 563; s. c., 37 Atl. R. 738. But see Dayton v. Melick, 27 N. J. Eq. (12 C. E. Green), 362; Pitts v. Powledge, 56 Ala. 147; Kennedy v. Green, 3 My. & K. 699, 718; Eyry v. Hughes, 2 Ch. D. 148; Osborne v. Barge, 30 Fed. R. 805; Green v. Turner, 80 Fed. R. 41.

when the bill prays specific performance,[5] file a cross-bill for the reformation of the contract.[6] In a suit to set aside a contract, the defendant cannot have the contract enforced unless he files a cross-bill,[7] when in a proper case he can also obtain a decree declaring the contract to be void.[8] A decree dismissing a bill to enjoin an action of ejectment cannot determine the title to the land in the absence of a cross-bill.[9] It has been held that a discharge in bankruptcy pending a suit,[10] the right to equitable set-off,[11] and the right of sureties to subrogation,[12] can only be pleaded by defendants in cross-bills. There are very few cases[13] in which a court can give one defendant relief against another, unless the former files a cross-bill.[14] In a case where the original bill prayed a confirmation of a title under a deed absolute in form, a cross-bill by one of the defendants, claiming that the deed be declared a trust deed for her sole benefit, was held to be germane to the subject-matter of the suit, and sufficient to support a decree binding the other defendants as well as the plaintiff.[15] A State statute authorizing affirmative relief upon an answer without a cross-bill will not be followed by a Circuit Court of the United States,[16] at least in a suit originally brought there.[17] No party is obliged to file a cross-bill unless the court orders him to do so.[18] Otherwise, he may ordinarily seek by an independent bill the relief which he desires.[19] It has been held that a mortgagee, who has

[5] *Infra*, § 171.

[6] Commonwealth T. T. & Tr. Co. v. Cummings, 83 Fed. R. 767; Green v. Stone, 54 N. J. Eq. 387; s. c., 34 Atl. R. 1099.

[7] Meissner v. Buck, 28 Fed. R. 161; Carnochan v. Christie, 11 Wheat. 446, 447.

[8] La Dow v. E. Bement & Sons, 66 Fed. R. 198; Duggar v. Dempsey, 43 Pac. R. 357; s. c., 13 Wash. 396; Bernhard v. Bruner, 65 Ill. App. 641; North British L. & N. Ins. Co. v. Lathrop (C. C. A.), 70 Fed. R. 429.

[9] Wood v. Collins, 60 Fed. R. 189.

[10] Banque Franco-Egyptienne v. Brown, 24 Fed. R. 106, 107.

[11] Meek v. McCormick (Tenn. Ch.), 42 S. W. R. 458. See Cartwright v. Clark, 4 Metc. (Mass.) 104; Derby v. Gage, 38 Ill. 27.

[12] Stokes v. Little, 65 Ill. App. 255.

[13] Smith v. Woolfolk, 115 U. S. 143, 148; Chamley v. Lord Dunsany, 2 Sch. & Lef. 690, 718; Conry v. Caulfield, 2 Ball & Beatty, 255; Elliott v. Pell, 1 Paige (N. Y.), 263; Langdell's Eq. Pl., §§ 155, 156. See § 172.

[14] Langdell's Eq. Pl., §§ 155, 156; Talbot v. McGee, 4 Monroe (Ky.), 375, 379; Beach v. Rice, 131 U. S. 293.

[15] Kingsbury v. Buckner, 134 U. S. 650, 677. See Griffin v. Griffin, 111 Mich. 538, 70 N. W. R. 423; Feige v. Babcock, 112 Mich. 423, 70 N. W. R. 7.

[16] White v. Bower, 48 Fed. R. 186; *supra*, § 6.

[17] Detroit v. Detroit City Ry. Co., 55 Fed. R. 569; Washburn & M. Mfg. Co. v. Scutt, 22 Fed. R. 710.

[18] Sharon v. Hill, 22 Fed. R. 28.

[19] Ibid.

been made a defendant to a suit to foreclose a subsequent railroad mortgage, cannot foreclose by an independent suit, but must file a cross-bill or a bill in the nature of a cross-bill.[20] Where a State of this Union,[21] and where a foreign government,[22] had sued, it was held that cross-bills might be filed against them. The objection that the relief granted in a decree was improper without a cross-bill cannot be raised in contempt proceedings, nor, ordinarily, for the first time upon an appeal.[23]

§ 171. Where a cross-bill should not be filed.— There are two important classes of cases in which the court gives relief to the defendant without a cross-bill. Suits for an account, in which, if it finally appears that the balance is in favor of the defendant, the court will give him a decree for the sum found to be due to him;[1] and bills for the specific performance of contracts, in which, if the parties differ as to the terms of the contract, and that question is decided in the defendant's favor, the court will compel the plaintiff to perform the contract thus established.[2] But these exceptions illustrate the rule; for they proceed distinctly upon the theory that the court only entertains such bills upon the condition that the plaintiff will consent to the same justice being rendered to the defendant that he asks for himself; and formerly this consent was required to be expressly given in the bill.[3] So, when a question had been fully litigated between a plaintiff and one defendant, and it appeared that the latter was liable, not to the former, but to a co-defendant, who was himself liable to the plaintiff to the

[20] Mercantile Tr. Co. v. Atlantic & P. R. Co., 70 Fed. R. 518.

[21] Port Royal & A. Ry. Co. v. South Carolina, 60 Fed. R. 552.

[22] Roman v. Sharp's Rifle Mfg. Co. 33 Conn. 31.

[23] Kelsey v. Hobby, 16 Peters, 269, 277; Moran v. Hagerman (C. C. A.), 64 Fed. R. 499; Coburn v. Cedar L. L. & C. Co., 138 U. S. 196, 222.

§ 171. [1] Clarke v. Tipping, 4 Beav. 588; Toulmin v. Reid, 14 Beav. 499; Jervis v. Berridge, L. R. 8 Ch. 357; Campbell v. Campbell, 4 Halst. Eq. (N. J.) 740; Little v. Merrill, 63 Me. 328. A cross-bill is not needed to authorize an allowance to defendant for improvements made while in possession of land. McClaskey v. Barr, 62 Fed. R. 209.

[2] Fife v. Clayton, 13 Ves. 546; Stapylton v. Scott, 13 Ves. 425; Bradford v. Union Bank of Tenn., 13 How. 57; Northern R. Co. v. O. & L. C. R. Co., 18 Fed. R. 815. But see s. c., 20 Fed. R. 347.

[3] Langdell's Eq. Pl., § 122; Clarke v. Tipping, 4 Beav. 588; Toulmin v. Reid, 14 Beav. 505; Kennington v. Houghton, 2 Y. & C. N. R. 630.

same extent, the court allowed a decree in favor of the latter defendant against the other without the filing of any cross-bill.[4] "When the decision of a controversy between a plaintiff and two defendants raises an incidental and collateral question between the co-defendants, the court will sometimes dispose of the latter by means of a reference to a master, and thus save the expense of a separate suit,[5] and the same course has been taken when it was impossible to give the plaintiff the relief to which he was entitled without first deciding a question between co-defendants."[6] "When the right claimed by a defendant consists simply in excluding the plaintiff from the right asserted by the latter, of course there is no occasion for a cross-bill. Therefore, when a bill is filed by a mortgagor against a mortgagee for redemption, if the defendant can show that the plaintiff is not entitled to redeem, he can obtain the benefit of a foreclosure without filing a cross-bill for the purpose; for the dismissal of a bill to redeem upon its merits is itself a foreclosure."[7] It has been said that where an original bill seeks to enforce an equitable title against several defendants, it is improper for a defendant to file a cross-bill seeking the enforcement of a title paramount against his co-defendants.[8]

[4] La Touche v. Lord Dunsany, 1 Sch. & Lef. 137, 166, 167; s. c. as Chamley v. Lord Dunsany, 2 Sch. & Lef. 690, 718; Langdell's Eq. Pl., § 125.

[5] Hood v. Clapham, 19 Beav. 90. See Elliott v. Pell, 1 Paige (N. Y.), 263.

[6] Langdell's Eq. Pl., § 125.

[7] Langdell's Eq. Pl., § 123. See Hilton v. Barrow, 1 Ves. Jr. 284.

[8] Ayres v. Carver, 17 How. 591, 593. Where a bill was filed by one tenant in common of a mortgage against the two others, who had bought in separate parcels the mortgaged property, the complainant seeking to recover from them his share of the purchase-money; it was held that a cross-bill could not be filed by one defendant against the other to recover a balance due him "resulting from the price severally paid and to be paid by them, as compared with the respective amounts" of their interests in the mortgage. Weaver v. Alter, 3 Woods, 152. Where a receiver of a bank filed a bill to set aside a transfer of shares of its stock by one defendant to another, and to hold the transferror liable to the creditors of the bank; it was held that the transferee could not file a cross-bill to set aside the transaction as between themselves for fraud practiced upon him by the others. Stuart v. Hayden (C. C. A.), 72 Fed. R. 402. In a suit by a depositor against a bank to recover the amount of checks paid on forged indorsements, it was held that defendant could not file a cross-bill against a second bank seeking to recover over in case it was held liable to plaintiff. Pollard v. Wellford, 99 Tenn. 118, 42 S. W. R. 23.

Where a bill was filed against the stockholders of an insolvent corpo-

It has been said that a cross-bill cannot be filed solely for the appointment of a receiver.[9] A party who could not maintain an original bill for certain relief, for example, a creditor who has not reduced his claim to judgment,[10] cannot, except

ration to collect out of their unpaid subscriptions the amount of a judgment against it, a cross-bill filed by one who had paid a larger proportion of his subscription than the rest, praying for an accounting, and that the others be compelled to pay the judgment, was held bad upon demurrer. Putnam v. New Albany, 4 Biss. 365, 373. Where a bill was filed by a remainderman under a will, claiming that certain provisions of the will establishing prior estates to his own were invalid, and praying that the trustees appointed by the will convey the property devised either to him, or to the heirs-at-law, or to the State; a bill filed by the heirs-at-law, not impugning the estate of the equitable tenant for life, but praying that the estates in remainder, some of which were to persons yet unborn, should be declared invalid, was held improper as a cross-bill. Cross v. De Valle, 1 Wall. 5. See Neal v. Foster, 34 Fed. R. 496, 498; Osborne v. Barge, 30 Fed. R. 805. Where, on a bill by several persons to restrain the infringement of a patent and for an account, the defenses being invalidity of the patent and a license, the court sustains the patent and decrees damages; a bill cannot be sustained as a cross-bill which sets up a judgment in another suit against one of the complainants, and prays that they all set forth and discover what share of the damages is claimed by each, so that the defendant who files the cross-bill may set off his judgment against the share claimed by his judgment creditor. Rubber Co. v. Goodyear, 9 Wall. 807. Upon bills to enjoin the infringements of patents, it has been held that a cross-bill cannot be filed by a defendant to enjoin the infringement of prior patents held by him (New D. Bell Co. v. Hardware S. Co., 62 Fed. R. 462; Stonemetz Pr. M. Co. v. Brown F. M. Co., 46 Fed. R. 851); nor to have the plaintiff's patent declared void as an interference with the same (New D. Bell Co. v. Hardware S. Co., 62 Fed. R. 462); nor by a defendant who claims no title to the patented invention, for the sole purpose of a discovery of the weakness of the complainant's title, an injunction against his suing to enforce his patent, and a decree declaring the patent void (Young v. Colt, 2 Blatchf. 373); nor seeking an injunction against the publication of circulars by plaintiff to defendant's customers, threatening them with suits and penalties if they use defendant's wares, which were charged to be infringements of plaintiff's patent (International T. C. Co. v. Carmichael, 44 Fed. R. 850. See Fougeres v. Murbarger, 44 Fed. R. 292, cited *supra*, § 74. *Contra*, Ide v. Ball Engine Co., 31 Fed. R. 901), nor where the original bill prayed for an injunction against the infringement of a patent relating to electric signals granted William R. Sykes, for an injunction against the use by complainant of the term "The Sykes System." Johnson R. R. S. Co. v. Union S. & S. Co., 43 Fed. R. 831. It has been held that, in such a suit,

[9] Indiana So. R. Co. v. Liverpool, L. & G. Ins. Co., 109 U. S. 168. But see Union Street Ry. Co. v. City of Saginaw, 115 Mich. 300, 73 N. W. R. 243; *supra*, § 170.

[10] Goff v. Kelly, 74 Fed. R. 827.

perhaps in an extraordinary case, obtain the same relief by a cross-bill.[11] His remedy, if any exists, is by a petition of intervention.[12] But it has been held that a defendant who is not in possession of land, when a bill is filed against him to remove a cloud to the title to the same, may, if he can show a better title than that of the complainant, obtain possession of the land by cross-bill.[13] And a cross-bill filed simply for discovery need

a third party who has been allowed to intervene cannot file a cross-bill which could not have been maintained by the original defendant. Curran v. St. Charles Car Co., 32 Fed. R. 835. But see Ide v. Ball E. Co., 31 Fed. R. 901. It has been held that, in a suit brought under United States Revised Statutes, section 4918, touching interfering patents, affirmative relief may be given the defendant upon his answer; and that a cross-bill is unnecessary (Lockwood v. Cleveland, 6 Fed. R. 721; Foster v. Lindsay, 3 Dill. 127; Electrical Accum. Co. v. Brush El. Co., 44 Fed. R. 602); but may be filed if the defendant so chooses. American C. B. Co. v. Ligowski C. P. Co., 31 Fed. R. 466; Electrical Accum. Co. v. Brush El. Co., 44 Fed. R. 602, 607. *Contra*, Lockwood v. Cleveland, 6 Fed. R. 721, 727. An answer in such a suit cannot be treated as a bill to enjoin an infringement. Electrical Accum. Co. v. Brush El. Co., 44 Fed. R. 602, 609.

In a suit by an administrator to recover assets it was held that a cross-bill was demurrable which sought an accounting of the administration of the estate of the intestate's father; although that would have resulted in increasing the estate held by the plaintiff and all the necessary parties were before the court. Harrison v. Perea, 168 U. S. 311; s. c. as Perea v. Harrison, 7 N. M. 666, 41 Pac. R. 529. Where to a bill for the cancellation of certain certificates of stock because unlawfully issued, the defendants alleged by a cross-bill that defendant corporation had decided to cease the manufacture of goods for a time, and that complainants had directed the concern to continue operations, and asked to have complainants restrained from further interference; it was held that the cross-bill should be stricken out as foreign to the subject-matter of the original bill. Allen v. Fury, 53 N. J. Eq. 35, 30 Atl. R. 551. On a suit to restrain the enforcement of a judgment, and to establish as a set-off a legal claim, a cross-bill seeking a settlement of a partnership alleged to have formerly existed between the parties was stricken out as foreign to the subject-matter of the original bill. O'Neill v. Perryman, 102 Ala. 522, 14 S. R. 898. Where the plaintiff, claiming the exclusive right under a contract to use the name of defendant in the sale of patent medicines, filed a bill against the latter to enjoin a violation thereof, and the latter filed an alleged cross-bill to enjoin complainant from making use of the name not authorized by the contract, it was held that this latter bill was not a true cross-bill, but an original bill. Chattanooga Medicine Co. v. Thedford, 58 Fed. R. 347. See also Colton v. Scott, 97 Ala. 447.

[11] Calverley v. Williams, 1 Ves. Jr. 211, 213; Goff v. Kelly, 74 Fed. R. 327; Story's Eq. Pl., § 398.

[12] Goff v. Kelly, 74 Fed. R. 327; *infra*, § 201.

[13] Greenwalt v. Duncan, 16 Fed. R. 85.

show no equity for discovery, as the court's jurisdiction for that purpose is sufficiently supplied by the original bill.[14]

Cross-bills were formerly used to bring to the attention of the court facts constituting a defense, which had occurred since the answer was filed, thus answering the purpose of a plea *puis darrein continuance* at law.[15] Now, however, it is more customary to plead such matters in a supplemental answer.[16]

§ 172. Frame of a cross-bill.— A cross-bill should state the previous proceedings in the suit, setting forth specifically the parties, the objects, and the prayer of the original bill; and the rights of the party exhibiting the cross-bill, which are necessary to be made the subject of a cross litigation, or the ground on which he resists the claims of the plaintiff in the original bill, whichever is the object of the cross-bill.[1] It should not introduce new and distinct matters not embraced in or germane to the original suit. For as to such matters it would be an original bill; and they could not properly be examined at the hearing upon the former bill.[2] It should not contain any statements inconsistent with those in the answer of the defendant filing it.[3] If so, they may be disregarded,[4] or if principally composed of such, the cross-bill may be dismissed.[5] It will be sustained even if the requisite difference of citizenship do not exist between the plaintiffs and defendants in it, as it is merely auxiliary to the principal suit of which the court has already obtained jurisdiction.[6] Where a stranger by leave of the State court intervened and then removed the case, and

[14] Story's Eq. Pl., § 399; Mitford's Pl., ch. 1, § 3; Doble v. Potman, Hardres, 160.

[15] Mitford's Pl., ch. 1, § 3; Hayne v. Hayne, 3 Ch. R. 19. See Kelsey v. Hobby, 16 Pet. 269, 277.

[16] See Suydam v. Triesdale, 6 McLean, 459; Kelsey v. Hobby, 16 Pet. 269, 277; Talmage v. Pell, 9 Paige (N. Y.), 410, 413; El. A. Co. v. Brush El. Co., 44 Fed. R. 602, 607. But see Banque Franco-Egyptienne v. Brown, 24 Fed. R. 106, 107; *supra*, § 170.

§ 172. [1] Story's Eq. Pl., § 401; Mitford's Pl., ch. 1, § 3. But see Neal v. Foster, 34 Fed. R. 496.

[2] Story's Eq. Pl., § 401; Weaver v. Alter, 3 Woods, 153; Cross v. De Valle, 1 Wall. 5; Ayres v. Carver, 17 How. 591; Rubber Co. v. Goodyear, 9 Wall. 807; *supra*, § 171.

[3] Savage v. Carter, 9 Dana (Ky.), 409, 414.

[4] Ibid.

[5] Hudson v. Hudson, 3 Rand. (Va.) 117.

[6] Peay v. Schenck & Bliss, Woolw. 175; Cross v. De Valle, 1 Wall. 5; Osborne Co. v. Barge, 30 Fed. R. 805; Jesup v. Illinois Cent. R. Co., 43 Fed. R. 483; Morgan's La. & T. R. R. & S. S. Co. v. Texas C. Ry. Co., 137 U. S. 171. But see Veach v. Rice, 131 U. S. 293, 318.

after removal the complainant amended his bill so as to omit all allegations affecting the intervenor, and then moved to remand, the fact that the intervenor had filed a cross-bill against the original parties to the suit was held no bar to the remand.[7] When a cross-bill is brought by one defendant against another, it seems that the original complainant must be made a party to it.[8] It has been said by a judge of great authority that "new parties cannot be introduced into a cause by a cross-bill."[9] It was then held that this could not be done when the result would be to arrange parties of the same citizenship upon different sides of a controversy over which a Federal court would have no original jurisdiction.[10] It has been said, however, that such an objection can be raised only by the new parties thus sought to be brought in.[11] In a suit to restrain the infringement of a patent, a cross-bill was sustained which brought in as defendant to it a new party, the assignor of the patent to the original complainant; claimed that that assignor had previously assigned the equitable title thereto to the orator of the cross-bill, and that the legal assignee had bought with notice thereof; and prayed a conveyance of the patent and an injunction against further annoyance.[12] And the rule seems to be established that, although new parties cannot be introduced by a cross-bill which seeks discovery only, or which is purely defensive, they may when it seeks affirmative relief and their presence is necessary to the determination of the controversy as thus enlarged.[13] A stranger to a suit cannot file a cross-bill

[7] Iowa H. Co. v. Des Moines N. & R. Co., 8 Fed. R. 97.

[8] Daniell's Ch. Pr. (2d Am. ed.) 1747; Putnam v. New Albany, 4 Biss. 365, 373.

[9] Mr. Justice Curtis in Shields v. Barrow, 17 How. 130, 145. See Randolph v. Robinson, 2 N. J. L. J. 171.

[10] Shields v. Barrow, 17 How. 130. Similar is Wright v. Frank, 61 Miss. 32.

[11] Brandon Mfg. Co. v. Prime, 14 Blatchf. 371.

[12] Ibid.

[13] Brandon Mfg. Co. v. Prime, 14 Blatchf. 371; Kanawha Lodge v. Swann, 37 W. Va. 176; s. c., 16 S. E. R. 462: Allen v. Tritch, 5 Colo. 222, 228; Hurd v. Case, 32 Ill. 457; Jones v. Smith, 14 Ill. 229; Blodgett v. Hobart, 18 Vt. 414; Hildebrand v. Beasley, 41 S. R. (Tenn.) 121, 123; Sharp v. Pike's Adm'r, 5 B. Mon. (Ky.) 155; Coster's Ex'rs v. Bank of Ga., 24 Ala. 39. Parties brought in as defendants to a cross-bill may, in turn, exhibit cross-bills when the same are necessary or proper to terminate the litigation. Blair v. Illinois S. Co., 42 N. E. R. 895; s. c., 159 Ill. 350. But it has been said that under the practice of the Federal courts one claiming an interest in the subject of litigation cannot properly be made a party

without permission from the court.[14] A cross-bill filed by a stranger without such permission may be stricken from the file.[15] In England a cross-bill could be filed in a different court from that where the original bill was pending;[16] but a cross-bill cannot be filed in a State court,[17] nor in another Federal court[18] to a bill pending in a Circuit Court of the United States. It is no objection to a cross-bill in a Federal court that an original bill for the same relief was previously filed in a court of the State where the Federal court was held;[19] but after a removal of the suit begun in the State court, the two suits may be consolidated.[20] A cross-bill should be signed by counsel.[21] In other respects cross-bills should conform to the requirements of original bills.[22] It is irregular to unite a cross-bill and an answer in the same pleading.[23] A petition "by way of a cross-bill" filed by a defendant, "referring to the case by title, and stating that 'the facts fully appear in the case,' praying the reverse of what the complainant had prayed, but not making anybody defendant nor praying process, and under which no process was obtained," was held a mere nullity, which should have been stricken from the file, and was disregarded by the court upon appeal.[24] It seems that a bill

defendant against the objection of complainant, and hence a cross-bill filed by a person thus coming into the cause should be dismissed. Gregory v. Pike (C. C. A.), 67 Fed. R. 837. See Thruston v. Big Stone G. L. Co., 86 Fed. R. 484.

[14] Bronson v. La Crosse & M. R. Co., 2 Wall. 283; Forbes v. Memphis, E. P. & P. R. Co., 2 Woods, 323; Gregory v. Pike, 67 Fed. R. 837.

[15] Bronson v. La Crosse & M. R. Co., 2 Wall. 283, 294, 303; Putnam v. New Albany, 4 Biss. 365, 367.

[16] Parker v. Leigh, 6 Madd. 115; Story's Eq. Pl., § 400.

[17] Story's Eq. Pl., § 400. See Tansey v. McDonnell, 142 Mass. 220, 221; Bowman v. Long, 27 Ga. 178; Neal v. Foster, 34 Fed. R. 496, 497.

[18] *Cf.* Gray v. Taylor (N. J. Ch.), 38 Atl. R. 951.

[19] Brandon Mfg. Co. v. Prime, 14 Blatchf. 371.

[20] Wabash, St. Louis & P. Ry. Co. v. Central T. Co., 23 Fed. R. 513.

[21] Smith's Ch. Pr., Book II, ch. i.

[22] Smith's Ch. Pr., Book II, ch. 1; Daniell's Ch. Pr. (5th Am. ed.), ch. xxxiv, § 1. See Mason v. Gardiner, 4 Brown Ch. C. 436; Greenwalt v. Duncan, 16 Fed. R. 35. A cross-bill seeking the distribution of a trust fund created by will, and also to subject complainant's share of the trust fund to the payment of a judgment obtained against him by one of the defendants, was held multifarious. Plum v. Smith, 56 N. J. Eq. 468, 39 Atl. R. 1070.

[23] Hubbard v. Turner, 2 McLean, 519, 540; Morgan v. Tipton, 3 McLean, 339, 344. But see Talbot v. McGee, 4 Monr. (Ky.) 375, 378.

[24] Washington R. R. v. Bradleys, 10 Wall. 303.

filed as a cross-bill, if irregular in that respect alone, may yet be sustained as an original bill [25] or as a petition *pro interesse suo*.[26] Matters which regularly should be included in a cross-bill may by consent be set up in an answer, and relief granted as if a cross-bill had been filed.[27] Where testimony had been taken without objection in support of a claim pleaded in an answer, it was held to be too late to object at the hearing because no cross-bill had been filed.[28] By consent a cross-bill may be filed when an answer is all that is required to protect the rights of the defendant.[29] When matter which should regularly have been set up by a cross-bill or supplemental answer has been pleaded in a petition, it is too late to object to the regularity of the procedure after answer and decree.[30] A bill intended as a bill of review, but defective in that respect, may be sustained as a cross-bill.[31] Where the State practice permitted affirmative relief upon an answer and such answer was filed before a removal, it was held that a cross-bill need not be filed in the Federal court.[32]

§ 173. Proceedings upon cross-bills.— It is the better practice for a defendant to apply for leave before filing a cross-bill.[1] Ordinarily, a refusal to grant leave will not be reviewed upon an appeal.[2] A cross-bill should not be filed before the answer

[25] Foss v. First Nat. Bank, 1 McCrary, 474.

[26] Heath v. Erie Ry. Co., 9 Blatchf 316. See Kelsey v. Hobby, 16 Pet 269.

[27] Gregory v. Pike, 67 Fed. R. 837. In this case, the costs of the cross-bill were imposed upon the cross-complainant.

[28] Northern R. Co. v. Ogdensburg & L. C. R. Co., 18 Fed. R. 815; s. c., 20 Fed. R. 347.

[29] Book v. Justice Min. Co., 58 Fed. R. 827.

[30] Kelsey v. Hobby, 19 Pet. 269, 277; Coburn v. Cedar V. L. & C. Co., 138 U. S. 196, 222; Detroit v. Detroit City Ry. Co., 55 Fed. R. 569.

[31] Houghton v. West, 2 Brown Pat. R., by Tomlins, 88; Story's Eq. Pl., § 401*a*.

[32] Detroit v. Detroit City Ry. Co., 55 Fed. R. 569.

§ 173. [1] Indiana & St. L. R. Co. v. Liverpool, L. & G. Ins. Co., 109 U. S. 168; Brown v. L. C. & M. W. R. Co., 2 Wall. 283; International T. C. Co. v. Carmichael, 44 Fed. R. 330; Mercantile Tr. Co. v. Missouri, K. & T. Ry. Co., 41 Fed. R. 8; Brush El. Co. v. Brush-Swan El. Co., 43 Fed. R. 701; Brown v. Bell, 4 Hay. (Tenn.) 287. *Contra*, Neal v. Foster, 34 Fed. R. 496, 498; Beauchamp v. Putnam, 34 Ill. 378, 381. It has been held that a creditor who has come in under a decree for the benefit of creditors may file a cross-bill without leave of the court, if his rights cannot be otherwise adequately protected. La Touche v. Lord Dunsany, 1 Sch. & Lef. 137; Story's Eq. Pl., § 397.

[2] Indiana & St. L. R. Co. v. Liverpool, L. & G. Ins. Co., 109 U. S. 168. *Contra*, Beauchamp v. Putnam, 34 Ill. 378, 381.

to the original bill.[3] It should regularly be filed with, or immediately after, the defendant's answer;[4] but may be allowed any time before the final decree.[5] In a case where the defendant, after answer, learned of facts tending to show that the plaintiff had before suit parted with all interest in the subject-matter to a citizen of the same State as the defendant, the proceedings were stayed until the complainant answered a cross-bill charging such a transfer.[6] A cross-bill in a suit by a State may be served upon the Attorney-General when he filed the original bill.[7] It has been held at Circuit that a subpœna to answer a cross-bill may, by express leave of the court, be served by substitution upon the attorney for the complainant to the original bill when his client is beyond the jurisdiction of the court.[8] In one case the court said: "The reason of this rule would seem to limit it in equity cases to cross-bills, either wholly or partly defensive in their character, and to deny its application to cross-bills setting up facts not alleged in the original bill, and which new facts, though they relate, as they must, to the subject-matter of the original bill, are made the basis for the affirmative relief."[9] Leave to make substituted service was refused in a case where the plaintiffs offered to stipulate that the matter sought to be pleaded by cross-bill might be set up by answer;[10] and where the cross-bill set up new matter not

[3] Allen v. Allen, Hempst. 58. A cross-bill filed before the complainant therein has filed his answer to the original bill may be stricken from the files on motion. Ballard v. Kennedy, 16 S. R. 827; s. c., 34 Fla. 483.

[4] Daniell's Ch. Pr. (2d Am. ed.) 1745; White v. Buloid, 2 Paige (N. Y.), 164; Allen v. Allen, Hempst. 58.

[5] Morgan's C. & T. R. S. S. Co. v. Texas C. R. Co., 137 U. S. 171. The old practice under which a cross-bill must ordinarily be filed before publication has been abrogated. Neal v. Foster, 34 Fed. R. 496; Rogers v. Reissner, 31 Fed. R. 592; Pullman's P. C. Co. v. Central Tr. Co., 46 Fed. R. 261; Huber v. Diebold, 25 N. J. Eq. 170.

[6] Young v. Pott, 4 Wash. 521. But see Westinghouse El. & N. Co. v. Mustard, 87 Fed. R. 836. It has been said that an objection of a defect of parties must precede the filing of a cross-bill. Plum v. Smith (N. J. Ch.), 39 Atl. R. 1070.

[7] Port Royal & A. Ry. Co. v. South Carolina, 60 Fed. R. 552.

[8] Lowenstein v. Glidewell, 5 Dill. 325; Kingsbury v. Buckner, 134 U. S. 650, 676; Peay v. Schenck & Bliss, Woolw. 175; Johnson R. R. S. Co. v. Union S. & S. Co., 43 Fed. R. 331. But see Rubber Co. v. Goodyear, 9 Wall. 807, 810, 811; § 96 and citations.

[9] Caldwell, J., in Lowenstein v. Glidewell, 5 Dill. 325, 328. See Rubber Co. v. Goodyear, 9 Wall. 807, 810, 811; and *supra*, § 96.

[10] Heath v. Erie Ry. Co., 9 Blatchf. 316.

set out in the original bill, germane to the case made by the original bill, and sought to make such new matter the basis of independent affirmative relief.[11] Service by publication of a subpœna upon a cross-bill was held to be improper.[12] It has been held that a cross-bill may be dismissed upon motion before an answer or a hearing when it sets up matter improper for such a pleading, even though it was filed by leave of the court.[13] A demurrer may, however, be filed to a cross-bill for want of equity, for multifariousness, for presenting matter improper for a cross-bill, or for objections which would be grounds of demurrer to an original bill.[14] "Where a defendant in equity files a cross-bill for discovery only against the plaintiff to the original bill, the defendant to the original bill shall first answer thereto before the original plaintiff shall be compellable to answer the cross-bill. The answer of the original plaintiff to such cross-bill may be read and used by the party filing the cross-bill at the hearing, in the same manner and under the same restrictions as the answer praying relief may now be read and used."[15] By amending his bill, the plaintiff was held in England to lose the benefit of a similar rule,[16] provided that, when he made the amendment, he knew that the cross-bill had been filed.[17] The testimony taken under the cross-bill may be read for or against the original bill; and the testimony taken under the original bill can be read for or against the cross-bill. In either case a formal order granting leave to do this, "saving all just exceptions," should first be obtained *ex parte*.[18] Both bills are usually heard together both in the first instance[19]

[11] Fidelity T. & S. Y. Co. v. Mobile St. Ry. Co., 53 Fed. R. 850.

[12] Webster Loom Co. v. Short, 10 Off. Gaz. 1019.

[13] Dickerman v. Northern Trust Co., 80 Fed. R. 450.

[14] Harrison v. Perea, 168 U. S. 311; American & G. M. & I. Corp. v. Marquam, 62 Fed. R. 960. Where a cross-bill in equity asks relief foreign to the litigation, in behalf of parties who have a right of action at law, it was held that it should be dismissed "without prejudice," and not "for want of equity." Barrett v. Short, 41 Ill. App. 25.

[15] Equity Rule 72. For a case where an answer to a cross-bill was held responsive, see Prentiss Tool & Supply Co. v. Godchaux, 66 Fed. R. 234.

[16] Noel v. King, 2 Madd. 392; Hannah v. Hodgson, 30 Beav. 12.

[17] Gray v. Haig, 13 Beav. 65.

[18] Daniell's Ch. Pr. (5th Am. ed.) 1552, 1553; Lubiere v. Genou, 2 Ves. Sen. 579.

[19] Ayres v. Carver, 17 How. 591; Moore v. Huntington, 17 Wall. 417, 422; Ex parte Railroad Co., 95 U. S. 221; Daniell's Ch. Pr. (2d Am. ed.) 1751. See Blythe v. Hinckley, 84 Fed. R. 228.

and upon appeal.[20] Where a decree had been made dismissing a cross-bill before a decree upon the original bill, it was held that an appeal therefrom taken before a decree upon the original bill must be dismissed.[21] A decree upon the original bill will supersede a previous decree upon a cross-bill if the two are inconsistent.[22] Where the cross-bill seeks affirmative relief, the voluntary dismissal of the original bill will not dismiss the cross-bill.[23] It is otherwise where the cross-bill merely seeks discovery.[24] It has been held that a dismissal of the original bill by the court after a hearing operates as a dismissal of a cross-bill between the defendants, even though the cross-bill show a good case for relief; "but as a cross-bill, it must follow the fate of the original bill."[25] But the later authorities hold that where the cross-bill is not purely defensive, but seeks original relief, and contains in itself sufficient allegations for an original bill, it is not affected by such a dismissal.[26] When an abatement takes place after a cross-bill has been filed, it seems that there should be a bill of revivor filed in both the original and the cross cause.[27] Otherwise, proceedings upon cross-bills are substantially the same as those upon original bills.[28]

[20] Ayres v. Carver, 17 How. 591; Ex parte Railroad Co., 95 U. S. 221.

[21] Ayres v. Carver, 17 How. 591.

[22] Ex parte Railroad Co., 95 U. S. 221, 225; Blythe v. Hinckley, 84 Fed. R. 228.

[23] Lowenstein v. Glidewell, 5 Dill. 325; Chicago & A. R. Co. v. Union R. M. Co., 109 U. S. 702.

[24] Donohoe v. Mariposa L. & M. Co., 1 Pac. Coast L. J. 211, 219.

[25] Mr. Justice Field in Dows v. Chicago, 11 Wall. 108, 113. See also Cross v. De Valle, 1 Wall. 5, 14. But see Wabash, St. L. & P. Ry. Co. v. Central T. Co., 22 Fed. R. 138, 142; Donohoe v. Mariposa L. & M. Co., 1 Pac. Coast L. J. 211; Jesup v. Illinois Cent. R. Co., 43 Fed. R. 483. It was held that where the original bill was dismissed "without prejudice," the cross-bill must also be dismissed "without prejudice." Blewitt v. Blewitt (Miss.), 13 S. R. 249. Where one who filed a cross-bill was held to have no standing in court, it was held that other parties who attempted to come in under the cross-bill must abide by the result declared against him who filed it. Stainback v. Junk Bros. L. & Mfg. Co., 98 Tenn. 306, 39 S. W. R. 530. See also Richman v. Donnell, 53 N. J. Eq. 32.

[26] San Diego Flume Co. v. Souther, 90 Fed. R. 164, 167; Sunflower Oil Co. v. Wilson, 147 U. S. 318; Holgate v. Eaton, 116 U. S. 33; Chicago & A. R. Co. v. Union Rolling Mill Co., 109 U. S. 702; Jackson v. Simmons (C. C. A.), 98 Fed. R. 768; Coogan v. McCarron, 50 N. J. Eq. 611, 25 Atl. R. 330.

[27] Story's Eq. Pl., § 363.

[28] See, however, Lautz v. Gordon, 28 Fed. R. 264; Puetz v. Bransford, 31 Fed. R. 458.

CHAPTER XIV.

BILLS OF REVIVOR, SUPPLEMENTAL BILLS, BILLS OF REVIVOR AND SUPPLEMENT, AND BILLS IN THE NATURE OF THE SAME.

§ 174. Abatement.— If any event happens after the filing of a bill in equity which makes it necessary to bring in a new party, either plaintiff or defendant, in order to obtain a complete or satisfactory determination of the controversy, the suit will either abate or become defective.[1] The abatement or defect must be remedied by the filing of a bill of revivor, a bill in the nature of a bill of revivor, a supplemental bill, a bill in the nature of a supplemental bill, or a bill of revivor and supplement.[2] An abatement takes place by the death of one of the parties, or, where a married woman is under a disability, by the marriage of a female plaintiff.[3] An action entirely abates by the death of any of the plaintiffs:[4] unless his interest therein wholly ceases by his death,[5] or survives to another party to the suit,[6] or he has been previously discharged by a decree in an interpleader[7] suit, or a suit in the nature of an interpleader; when it does not. Formerly a suit abated by the marriage of a female plaintiff;[8] but it may be doubted whether this rule would be followed where a married woman has the same power over her property as if she were single.[9] By the marriage of a female defendant, a suit never abated, though her husband had to be named in all subsequent proceedings.[10] When the husband of a female plaintiff died, by

§ 174. [1] Mitford's Pl., ch. 1, § 3.

[2] Mitford's Pl., ch. 1, § 3. See *infra*, § 373, for proceedings at common law.

[3] Mitford's Pl., ch. 1, § 3.

[4] Mitford's Pl., ch. 1, § 3; Story's Eq. Pl., § 354.

[5] Daniell's Ch. Pr. (2d Am. ed.) 1698; Mitford's Pl., ch. 1, § 3.

[6] Fallowes v. Williamson, 11 Ves. 309; Boddy v. Kent, 1 Mer. 364; Fisher v. Rutherford, Baldw. 188; Daniell's Ch. Pr. (2d Am. ed.) 1699.

[7] Anon., 1 Vern. 351; Jennings v. Nugent, 1 Molloy, 184; Daniell's Ch. Pr. (2d Am. ed.) 1765.

[8] Mitford's Pl., ch. 1, § 3; Story's Eq. Pl., § 354.

[9] Lorillard v. Standard Oil Co., 2 Fed. R. 902.

[10] Mitford's Pl., ch. 1, § 3; Story's Eq. Pl., § 354. A suit does not abate

the former practice she could at her option continue the suit without filing any bill of revivor; but if she did not, it was considered abated and she was not liable for the costs.[11] A suit abates upon the death of a defendant who has appeared so far as proceedings against him or his interest are concerned, and if he were an indispensable party to a decree all proceedings must be suspended till his representatives have been brought in.[12] If, however, his interest wholly ceases by his death, or wholly survives to one of the other parties, no revivor will be necessary.[13] A suit abates by the death of a member of a firm during a suit against it.[14] The death of a defendant before appearance does not abate the suit. For, according to the former practice, till his appearance, or a decree taken against him *pro confesso*, there was no cause against him: but a bill had to be filed against his representative, which was an original bill as far as respected the defendant, but a supplemental bill with respect to the suit.[15] A suit to enjoin an official act abates when the defendant ceases to be a public officer, and cannot ordinarily be revived against his successor.[16] It has been held that the death of a sole defendant to a suit for an injunction against the infringement of a patent and for an accounting, when it occurs before a decree for an account, abates and terminates so much of the suit as seeks an injunction, so that it cannot be revived against his executor, unless it be shown that the latter continues the infringement;[17] but that the suit may be continued against the personal representative for an accounting of profits and for damages.[18] After an

by the marriage of a male defendant, althought it affects real estate. Clark v. Hall, 7 Paige (N. Y.), 382. The coming of age of an infant party does not abate the suit or render it defective unless his interest is thereby charged. Campbell v. Bowne, 5 Paige (N. Y.), 34.

[11] Mitford's Pl., ch. 1, § 8.

[12] Story's Eq. Pl., § 369; Wright v. Phipps, 58 Fed. R. 552.

[13] Mitford's Pl., ch. 1, § 8; Daniell's Ch. Pr. (2d Am. ed.) 1698, 1699; Story's Eq. Pl., § 357.

[14] Wilson v. Seligman (U. S. C. C. S. D. N. Y. 1880), 10 Rep. 651.

[15] Shadwell, V. C., in Crowfoot v. Mander, 9 Sim. 396. See U. S. v. Fields, 4 Blatchf. 326.

[16] Warner V. S. Co. v. Smith, 165 U. S. 28.

[17] Draper v. Hudson, 1 Holmes, 208; Walker on Patents, § 700.

[18] Kirk v. Du Bois, 28 Fed. R. 460; Hohorst v. Howard, 37 Fed. R. 97; Lake Superior I. Co. v. Brown, B. & Co., 44 Fed. R. 539; Head v. Porter, 70 Fed. R. 498; Atterbury v. Gill, 13 Off. Gaz. 276; Smith v. Baker, 1 Ban. & A. 117.

interlocutory decree for an accounting, such a suit may be revived against the personal representatives of the deceased defendant.[19] Unless there be some clause in its charter to the contrary, a suit by or against a corporation ordinarily abates by the dissolution of the corporation;[20] but it has been held that the entrance into liquidation and the closing of the business of a national banking association does not abate a suit brought in its name.[21] After a decree has been reversed upon appeal, and the cause sent back with a special mandate directing the further proceedings to be taken, or affirmed upon appeal and sent back with a mandate directing its enforcement, it is too late to claim for the first time that the suit has abated by the death of the complainant before the entry of the decree from which the appeal was taken.[22]

§ 175. Effect of abatement.— "An abatement, in the sense of the common law, is an entire overthrow or destruction of the suit, so that it is quashed and ended. But in the sense of courts of equity, an abatement signifies only a present suspension of all proceedings in the suit, from the want of proper parties capable of proceeding therein. At the common law, a suit, when abated, is absolutely dead. But in equity, a suit, when abated, is (if such an expression be allowable) merely in a state of suspended animation, and it may be revived."[1] Upon the total abatement of a suit the cause is completely suspended while the abatement continues; and, in general, all orders made pending such abatement will be considered nugatory and may be discharged.[2] Applications may, however, be made by

[19] Atterbury v. Gill, 18 Off. Gaz. 276.

[20] National Bank v. Colby, 21 Wall. 609; Greeley v. Smith, 3 Story, 658; Mumma v. Potomac Co., 8 Pet. 281. But see Lake Sup. I. Co. v. Brown, B. & Co., 44 Fed. R. 539; as to municipal corporations, Hemingway v. Stansell, 106 U. S. 399; Grantland v. Memphis, 12 Fed. R. 287; as to the effect of a consolidation of two corporations, Edison El. L. Co. v. Westinghouse, 34 Fed. R. 232; as to the effect of a State statute upon foreign corporations, Marion Phosphate Co. v. Perry (C. C. A.), 74 Fed. R. 425.

[21] National Bank v. Insurance Co., 104 U. S. 54, 72. The appointment of a receiver does not abate a suit against a national bank. Chemical Nat. Bank v. Hartford Deposit Co., 161 U. S. 1.

[22] Ex parte Sory, 12 Pet. 339, 342; Lake Sup. I. Co. v. Brown, B. & Co., 44 Fed. R. 539.

§ 175. [1] Story's Eq. Pl., § 354. See also Hoxie v. Carr, 1 Sumn. 173, 178; Mellus v. Thompson, 1 Cliff. 125, 129.

[2] Daniell's Ch. Pr. (2d Am. ed.) 1714; Griswold v. Hill, 1 Paine, 483.

parties affected thereby, to discharge process of contempt issued or executed pending the statement.[3] Applications have, moreover, been granted during an abatement for the payment of money out of court, when the right thereto had been previously established;[4] for the preservation of the property in dispute;[5] for the punishment of a party for breach of an injunction;[6] and to set aside irregular proceedings pending the abatement.[7] So, too, a decree previously made could be enrolled;[8] and it has been held in England that depositions might be taken under a commission previously issued.[9] Orders previously made continue in force until discharged.[10] But the time given a party within which to do a certain act is always suspended by an abatement.[11] Where a preliminary injunction has been previously granted, the court may issue an order requiring that the representatives of a deceased plaintiff revive within a certain time, usually a fortnight after notice, or that the injunction be dissolved.[12] No such order will be granted after a decree for a perpetual injunction; for that "would be in effect decreeing a perpetual suit."[13] The power of the court to make an order that the representatives of a deceased plaintiff revive within a certain limited time after notice to them, or that the bill be dismissed, is doubtful.[14] Where the abatement is partial, as where it is caused by the death of a defendant, it prevents those proceedings only by which his interest may be affected.[15] Thus, if there be a decree against trustees and the

[3] Daniell's Ch. Pr. (2d Am. ed.) 1715.

[4] Finch v. Lord Winchelsea, 1 Eq. Cas. Abr. 2; Roundell v. Currer, 6 Ves. 250; Daniell's Ch. Pr. (2d Am. ed.) 1715. See Wharam v. Broughton, 1 Ves. Sr. 185.

[5] Washington Ins. Co. v. Slee, 2 Paige (N. Y.), 365, 368.

[6] Hawley v. Bennett, 4 Paige (N. Y.), 163.

[7] Quackenbush v. Leonard, 10 Paige (N. Y.). 131.

[8] Daniell's Ch. Pr. (2d Am. ed.) 1715.

[9] Thompson v. Took, 1 Dick. 115; Peters v. Robinson, 1 Dick. 116; Sinclair v. James, 1 Dick. 277.

[10] Daniell's Ch. Pr. (2d Am. ed.) 1716; Lee v. Lee, 1 Hare, 622; Hawley v. Bennett, 4 Paige (N. Y.), 163.

[11] Gregson v. Oswald, 1 Cox, Eq. 343.

[12] Jones v. Massey, Brown v. Warner, Turner v. Cole, all quoted in Chowick v. Dimes, 3 Beav. 290, 292, 293; Chester v. Life Ass'n of America, 4 Fed. R. 487.

[13] Askew v. Townsend. 2 Dick. 471.

[14] Compare *dictum* of Judge Story in Hoxie v. Carr, 1 Sumn. 173, 178, and the case of Chowick v. Dimes, 3 Beav. 290, where Lord Langdale, M. R., granted such an order, with that of Lee v. Lee, 1 Hare, 617, where Vice-Chancellor Wigram held that the court had no power to make one.

[15] Daniell's Ch. Pr. (2d Am. ed.) 1716; Finch v. Lord Winchelsea, 1 Eq. Cas. Abr. 2.

beneficiary of their trust for a conveyance, and the beneficiary die, the trustees may still be obliged to convey;[16] and, after the death of one defendant, process of contempt may be issued and executed against the others;[17] after its abatement by the death of the owner of the equity of redemption, a foreclosure suit cannot be remanded before its revivor.[18] It has also been held that the death of a defendant after hearing but before a decree does not necessarily prevent judgment,[19] which should then be entered as of the date of the hearing, *nunc pro tunc*, and that, if practicable, a decree made before a defendant's death, for example, a decree for a sale, may be enforced without revivor.[20]

§ 176. When a suit may be revived and effect of revivor. A suit which has abated may generally be revived when anything further remains to be done therein.[1] But a suit will not be allowed to be revived merely for costs which are untaxed, and have not been previously directed to be paid out of a particular estate or fund, nor decreed against an executor out of assets.[2] Nor can a bill of revivor be brought upon a bill filed merely for discovery, after the discovery required thereby has been obtained.[3] A suit cannot be revived seven years after its dismissal for a defect of parties caused by a failure to revive.[4] Where the abatement is by the death or marriage of a plaintiff, an order to revive the suit places it and all proceedings in it in precisely "the same plight, state, and condition that the same were in at the time when the abatement took place."[5] The new plaintiff may then take the same proceedings that the original plaintiff might have done.[6] Thus, the

[16] Finch v. Lord Winchelsea, 1 Eq. Cas. Abr. 2; Daniell's Ch. Pr. (2d Am. ed.) 1716.

[17] Daniell's Ch. Pr. (2d Am. ed.) 1716.

[18] Wright v. Phipps, 58 Fed. R. 552.

[19] Davies v. Davies, 9 Ves. 461; Daniell's Ch. Pr. (2d Am. ed.) 1717.

[20] Whiting v. Bank of U. S., 13 Pet. 6.

§ 176. [1] Gilbert's Forum Romanum, 181; Johnson v. Peck, 2 Ves. Sen. 465; Fitzpatrick v. Domingo, 14 Fed. R. 216; Daniell's Ch. Pr. (2d Am. ed.) 1694. See Warner V. S. Co. v. Smith, 165 U. S. 28, and *supra*, § 114.

[2] Daniell's Ch. Pr. (2d Am. ed.) 1694–1697; Story's Eq. Pl., § 371; Blower v. Morrets, 3 Atk. 772; Kemp v. Mackrell, 3 Atk. 812; Travis v. Waters, 1 J. Ch. (N. Y.) 85.

[3] Horsburg v. Baker, 1 Pet. 232.

[4] Houth v. Owens, 30 Fed. R. 910.

[5] Gregson v. Oswald, 1 Cox Eq. 344.

[6] Vattier v. Hinde, 7 Pet. 252, 266; Phillips v. Derbie, 1 Dick. 98; Hyde v. Forster, 1 Dick. 132; Daniell's Ch. Pr. (2d Am. ed.) 1778.

new plaintiff may prosecute process of contempt against the defendant, taking it up where it stood at the abatement; and if a process has been previously issued it will be revived with the revivor of the suit.[7] But where the abatement is caused by the death of a defendant, "the process, being personal, cannot be revived."[8] In general, however, an order to revive against the representatives of a deceased defendant, will place the suit as fully in the same position with regard to such representatives as can be done with reference to the change of the individuals before the court.[9] After revivor testimony previously taken can be used.[10]

§ 177. Who may revive a suit.—It is generally necessary, in order to entitle one to revive, that there should be a privity in representation between him and the party whose death caused the abatement. Therefore, upon the death of one suing in a representative capacity, the defect can usually be remedied only by a supplemental bill, and not by a bill of revivor.[1] It has been held, however, that upon the death of an administrator, the administrator *de bonis non* may file a bill of revivor, "though there is no actual privity between him and the original plaintiff."[2] But Judge Story suggests that a bill in the nature of a bill of revivor would be more appropriate.[3] It is said by Lord Redesdale that in the case of a bill by creditors on behalf of themselves and other creditors, any creditor may revive;[4] but according to Daniell, in practice the form of a bill in such a case is that of a supplemental bill in the nature of a bill of revivor, and not of a mere bill of revivor.[5] Before decree, a suit can only be revived by one or all of the surviving plaintiffs, or the representatives of one that has died.[6] If any of these refuse to join, he must be made a defendant to the bill filed to revive the suit.[7] If the suit concerned solely the real estate of

[7] Hyde v. Forster, 1 Dick. 132; Daniell's Ch. Pr. (2d Am. ed.) 1778.

[8] Daniell's Ch. Pr. (2d Am. ed.) 1778.

[9] Daniell's Ch. Pr. (2d Am. ed.) 1778.

[10] Vattier v. Hinde, 7 Pet. 252, 266.

§ 177. [1] Daniell's Ch. Pr. (2d Am. ed.) 1697; Story's Eq. Pl., § 340.

[2] Daniell's Ch. Pr. (2d Am. ed.) 1697; Mitford's Pl., ch. 1, § 3; Huggins v. York Bldg. Co., 2 Eq. Cas. Abr. 3; Owen v. Curzon, 2 Vern. 237; Newcombe v. Murray, 77 Fed. R. 492.

[3] Story's Eq. Pl., § 382, note 4.

[4] Mitford's Pl., ch. 1, § 3.

[5] Daniell's Ch. Pr. (2d Am. ed.) 1703.

[6] Daniell's Ch. Pr. (2d Am. ed.) 1700; Chester v. Life Ass'n of America, 4 Fed. R. 487.

[7] Daniell's Ch. Pr. (2d Am. ed.) 1700; Fallowes v. Williamson, 11 Ves. 309.

a deceased plaintiff, his heirs alone are entitled to represent him therein;[8] if solely his personal estate, his executor or administrator;[9] if both, separate bills of revivor may be filed by his heirs and personal representatives, and the neglect of one to revive will not prejudice the other.[10] In the case of a suit by a corporation sole, the death of the plaintiff, if he were entitled to the subject-matter for his own benefit, caused an abatement; and the suit could be revived by his personal representative.[11] If, however, he were only entitled to the subject-matter in his corporate capacity, the suit became defective, and could only be continued by his successor by means of an original bill in the nature of a supplemental bill.[12] Where a corporation had, by a purchase at a foreclosure sale, succeeded to the rights of one that was defunct, it was held that it could not by a bill of revivor take the benefit of a suit by the stockholders of the defunct corporation, to which the mortgagee had not been a party.[13] After a decree, a suit may be revived by any defendant, or by the representative of any deceased defendant, who has acquired any right thereunder, as well as by any plaintiff.[14]

§ 178. Manner of revivor in general.— "When a suit became abated after a decree signed and enrolled, it was anciently the practice to revive the decree by a subpœna in the nature of a *scire facias*, upon the return of which the party to whom it was directed might show cause against the reviving of the decree, by insisting that it was not bound by the decree, or that for some other reason it ought not to be enforced against him, or that the person suing the subpœna was not entitled to the benefit of the decree. If the opinion of the court was in his favor he was dismissed with costs. If it was against him, or if he did not oppose the reviving of the decree, interrogatories were exhibited for his examination touching any matter neces-

[8] Mitford's Eq. Pl., ch. 1, § 3; Ferrers v. Cherry, 1 Eq. Cas. Abr. 3, 4; Mellus v. Thompson, 1 Cliff. 125.

[9] Mitford's Pl., ch. 1, § 3; Mellus v. Thompson, 1 Cliff. 125; Ferrers v. Cherry, 1 Eq. Cas. Abr. 3, 4.

[10] Mitford's Pl., ch. 1, § 3; Story's Eq. Pl., § 867; Mellus v. Thompson, 1 Cliff. 125; Ferrers v. Cherry, 1 Eq. Cas. Abr. 3, 4.

[11] Daniell's Ch. Pr. (2d Am. ed.) 28, 1701; 1 Kyd on Corporations, 77.

[12] Daniell's Ch. Pr. (2d Am. ed.) 28, 1701; 2 Bac. Abr., Corporation, E. 2.

[13] Keokuk & W. R. Co. v. Scotland County, 152 U. S. 318.

[14] Williams v. Cooke, 10 Ves. 406; Devaynes v. Morris, 1 Myl. & Cr. 213, 225.

sary to the proceedings. If he opposed the reviving of the decree on the ground of facts which were disputed, he was also to be examined upon interrogatories, to which he might answer or plead; and issue being joined, and witnesses examined, the matter was finally heard and determined by the court. But if there had been any proceeding subsequent to the decree, this process was ineffectual, as it revived the decree only, and the subsequent proceedings would not be revived but by bill, and the enrollment of decrees being now much disused, it is become the practice to revive in all cases indiscriminately by bill."[1] The writer is not acquainted with any instance of such practice in the United States. The only methods of reviving a suit in equity in the Federal courts seem to be a bill of revivor, a bill in the nature of a bill of revivor, a bill of revivor and supplement, and a supplemental bill in the nature of a bill of revivor. It was held in one case that the personal representative of a deceased defendant may voluntarily come in and be made a party upon motion.[2] When a board of public officers was abolished by statute and a new board substituted for it, it was held, without determining whether or not a revivor was necessary, that the members of the new board could properly be made parties to the suit by means of a bill of revivor.[3]

§ 179. Definitions of bills of revivor and parties to the same.— A bill of revivor is a continuance of the original bill, when, by death, some party to it has become incapable of prosecuting or defending a suit, or a female plaintiff has by marriage incapacitated herself from suing alone.[1] "Whenever a suit abates by death, and the interest of the person whose death has caused the abatement is transmitted to that representative which the law gives or ascertains, as an heir-at-law, executor, or administrator; so that the title cannot be disputed, at least in the Court of Chancery, but the person in whom the title is vested is alone to be ascertained; the suit may be continued by bill of revivor merely. If a suit abates by marriage of a female plaintiff, and no act is done to affect

§ 178. [1] Mitford's Ch. Pl., ch. 1, § 3.

[2] Griswold v. Hill, 1 Paine, 488. See U. S. R. S., § 955.

[3] Hemingway v. Stansell, 106 U. S. 399, 402. See also The Sapphire, 11 Wall. 164; Allen v. Mayor, 18 Blatchf. 239; s. c., 7 Fed. R. 488.

§ 179. [1] Mitford's Pl., ch. 1, § 3; Fitzpatrick v. Domingo, 14 Fed. R. 216.

the rights of the party but the marriage, no title can be disputed; the person of the husband is the sole fact to be ascertained; and therefore the suit may be continued in this case likewise by bill of revivor merely."[2] The persons who may be plaintiffs in a bill of revivor have been specified in a preceding section.[3] If the abatement be caused by the death or marriage of a plaintiff, all previous defendants to the suit must be made parties to the bill of revivor; unless it be filed after a decree, when all whose rights or duties have been fixed and ascertained thereby must be joined.[4] If any of the previous plaintiffs refuse to join in the continuance of the suit, they also must be made defendants to the bill of revivor.[5] If the abatement be caused by the death of a defendant, only his heirs or personal representatives, or both, according as the suit affected his interest in real or personal property, should be made defendants to the bill of revivor;[6] unless the bill be filed after a decree, when all parties interested thereunder should be joined.[7] There is no need of any difference of citizenship among the different parties to such a bill, provided that the court had jurisdiction of the original suit.[8] A bill of revivor cannot be filed against the representatives of a defendant not served with process under the original bill.[9] They can only be brought in by a bill in the nature of an original bill.[10]

§ 180. Frame of a bill of revivor.— A bill of revivor must state the filing of the original bill, and the several proceedings thereon, and the abatement;[1] but it need not set forth any of the statements in the original suit, unless the special circumstances of the case require it.[2] "It must show a title to revive, and charge that the cause ought to be revived, and stand in the same condition with respect to the parties in the bill of revivor as it was in with respect to the parties to the original bill at the time the abatement happened; and it must pray that

[2] Mitford's Pl., ch. 1, § 8.
[3] § 177.
[4] Daniell's Ch. Pr. (2d Am. ed.) 1703, 1704.
[5] Finch v. Lord Winchelsea, 1 Eq. Cas. Abr. 2; Daniell's Ch. Pr. (2d Am. ed.) 1700.
[6] Bettes v. Dana, 2 Sumn. 383; Daniell's Ch. Pr. (2d Am. ed.) 1704.
[7] Daniell's Ch. Pr. 1704.
[8] Clark v. Mathewson, 12 Pet. 164; s. c., 2 Sumn. 262.
[9] U. S. v. Fields, 4 Blatchf. 326.
[10] See § 174.

§ 180. [1] Mitford's Pl., ch. 1, § 8.
[2] Rule 58.

the suit may be revived accordingly."[3] Where a decree has been made reviving a former decree, a second bill for the same purpose properly seeks to revive the first decree of revivor, and so, *ipso facto*, the original decree.[4] If a bill of revivor seeks simply to revive the suit, it prays only for a subpœna to revive. If it requires an answer, it should pray a subpœna to revive and answer.[5] This is usually only required in two classes of cases. Where the bill is filed against an executor or administrator, and requires an admission of assets, the prayer usually is, not only that the suit may be revived, but also that, in case the defendant shall not admit assets to answer the purposes of the suit, an account of the estate of the deceased party may be taken; "and so far the bill is in the nature of an original bill."[6] "If a defendant to an original bill dies before putting in an answer, or after an answer to which exceptions have been taken, or after an amendment of the bill to which no answer has been given, the bill of revivor, though requiring in itself no answer, must pray that the person against whom it seeks to revive the suit may answer the original bill, or so much of it as the exceptions taken to the answer of the former defendant extend to, or the amendment remaining unanswered."[7] A bill of revivor should be signed by counsel, and in general comply so far as is practicable with the requirements for original bills.[8]

§ 181. **Proceedings upon bills of revivor.**— The Equity Rules provide that "whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor, or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same, which bill may be filed in the clerk's office at any time; and upon suggestion of the facts, the proper process of subpœna shall, as of course, be issued by the clerk, requiring the proper representatives of the other party to appear and show cause, if any they have, why the cause should not be revived. And if no cause shall be shown at the next rule-day which shall occur after fourteen days from the time of the service of the same

[3] Mitford's Pl., ch. 1, § 8.
[4] Shainwald v. Lewis, 69 Fed. R. 487.
[5] Mitford's Pl., ch. 1, § 8; Daniell's Ch. Pr. (2d Am. ed.) 1707.
[6] Mitford's Pl., ch. 1, § 8.
[7] Mitford's Pl., ch. 1, § 8.
[8] Daniell's Ch. Pr. (2d Am. ed.) 1707.

process, the suit shall stand revived, as of course."[1] The Revised Statutes provide "when either of the parties, whether plaintiff, petitioner, or defendant, dies before final judgment, the executor or administrator may, if the suit survives, prosecute or defend to final judgment. The defendant shall answer, and the cause will be heard and determined, and judgment rendered for or against the executor or administrator. If the executor or administrator neglects or refuses to become a party twenty days after being served with a *scire facias*, the court may nevertheless render judgment against the deceased party. The executor or administrator on becoming a party is entitled to a continuance until the next term."[2] The form of the subpœna upon a bill of revivor is the same as that upon an original bill, except that it states the nature of the bill to which the defendant is required to appear, and the time allowed him by the rules in which to do so.[3] The subpœna is also sued out and served in the same manner as one upon an original bill;[4] but substituted service of the subpœna upon the attorney of the defendant to the original bill may be allowed when the original defendant is beyond the reach of process.[5] It has been held that a suit cannot be revived against the foreign executor or administrator of a deceased defendant who has not taken out letters within the jurisdiction of the court, and has no assets there.[6] If the defendant refuses to appear, process of contempt may be issued against him.[7] A defendant who wishes to oppose the revivor should demur or plead to the bill, or perhaps show cause by affidavit to the contrary.[8] Where an answer is required, that should probably accompany the demurrer or plea. It is not expedient to take in the answer any objection to the revivor. For the English rule was that an objection thus taken would not prevent the order to revive, and the point could then only be determined by bringing the cause regularly to a hearing.[9]

§ 181. [1] Rule 56. See Oliver v. Decatur, 4 Cranch, C. C. 592.

[2] U. S. R. S., § 955. See Griswold v. Hill, 1 Paine 488.

[3] Daniell's Ch. Pr. (2d Am. ed.) 1707.

[4] Daniell's Ch. Pr. (2d Am. ed.) 1707.

[5] Dunn v. Clarke, 8 Pet. 1, 2; Norton v. Hepworth, 1 Hall & Tw. 158. See § 96.

[6] Mellus v. Thompson, 1 Cliff. 125.

[7] Daniell's Ch. Pr. (2d Am. ed.) 1707.

[8] Daniell's Ch. Pr. (2d Am. ed.) 1709, 1710; Rule 58.

[9] Daniell's Ch. Pr. (2d Am. ed.) 1709, 1711; Harris v. Pollard, 3 P. Wms. 348; Lewis v. Bridgman, 2 Sim. 465; Codrington v. Houlditch, 5 Sim. 286.

A bill of revivor is demurrable if it does not show a sufficient ground for reviving the suit or any part of it, either by or against the person by or against whom it is filed;[10] for want of parties apparent upon its face, though not for the omission of such as had not appeared before, or were not before the court at the time of the abatement;[11] and for any serious defect in form. Upon a demurrer to a bill of revivor, the sufficiency of the original bill cannot be considered.[12] Should, however, the original bill fail to state facts giving the Federal courts jurisdiction, that objection may be raised by a demurrer to the bill of revivor.[13] If a bill of revivor be brought without sufficient cause to revive, and this be not apparent upon its face, or if the plaintiff is not entitled to revive the suit at all, though a title is stated in the bill so that it is not demurrable, the defendant may set up his objections to it by plea.[14] The running of the statute of limitations after the time when a person became entitled to revive is also in most cases, except after a decree for an account,[15] a defense and a bar to a bill of revivor, which may be set up by plea.[16] No plea can be put in against a bill of revivor which has been pleaded to the original bill and overruled, although if a plea has been put in and the suit abated before argument, it may subsequently be pleaded anew to the original bill.[17] When an answer to a bill of revivor is required, it must be confined to such matters as are called for by the bill, or as would be material to the defense with reference to the order made upon it.[18] Allegations which might have been pleaded before abatement to the original bill will be

[10] Harris v. Pollard, 3 P. Wms. 348; University College v. Foxcroft, 2 Ch. R. 244; Daniell's Ch. Pr. (2d Am. ed.) 1709, 1710; Story's Eq. Pl., §§ 617, 829.

[11] Metcalfe v. Metcalfe, 1 Keen, 74; Crowfoot v. Mander, 9 Sim. 396; Daniell's Ch. Pr. (2d Am. ed.) 1710.

[12] Mason v. Hartford, P. & F. Ry. Co., 19 Fed. R. 53, 55; Sharon v. Terry, 36 Fed. R. 337.

[13] Sharon v. Terry, 36 Fed. R. 337.

[14] Daniell's Ch. Pr. (2d Am. ed.) 1710; Lewis v. Bridgman, 2 Sim. 465.

[15] Hollingshead's Case, 1 P. Wms. 742; Daniell's Ch. Pr. (2d Am. ed.) 1711.

[16] Daniell's Ch. Pr. (2d Am. ed.) 1710; Coit v. Campbell, 82 N. Y. 509; Perry v. Jenkins, 1 Myl. & Cr. 122; Mason v. Hartford, P. & F. Ry. Co., 19 Fed. R. 53, 56; Story's Eq. Pl., § 831. A bill of revivor was stricken from the file when filed twelve years after the filing of an opinion dismissing the original bill, although no decree upon the opinion was ever entered. Hubbell v. Lankenan, 63 Fed. R. 881.

[17] Daniell's Ch. Pr. (2d Am. ed.) 1711.

[18] Daniell's Ch. Pr. (2d Am. ed.) 1711; Story's Eq. Pl., § 868a.

considered as impertinent,[19] and disregarded.[20] It will not, however, be impertinent, if it states matters of defense which have occurred since the answer to the original bill was filed, though these do not affect the title of the plaintiff to revive.[21] Such an answer is impertinent when it describes and complains of irregularities in the suit before the abatement.[22] Such an answer should be signed by counsel;[23] and exceptions will lie to it for insufficiency, scandal, and impertinence.[24] If it does not admit the plaintiff's title to revive or state any circumstances which he is desirous of controverting, it must, if the abatement has taken place after decree or issue joined in the original cause, be replied to.[25] Otherwise, a separate replication will be unnecessary, and one replication will put in issue both the allegations in that and those in the original answer.[26] In all other respects, the form and the proceedings upon demurrers, pleas, and answers to bills of revivor should conform as nearly as possible to those of and upon similar pleadings to original bills.[27] A bill of revivor need not be set down for a hearing, unless it prays other relief than a mere revivor.[28] Where a bill of revivor seeks merely an admission of assets and a revivor, and the defendant admits assets, the cause may proceed upon the order of revivor merely.[29] If, however, any issue is joined upon the answer to it, a hearing will be necessary.[30] The sole questions before the court when a bill of revivor is filed are the competency of the parties by and against whom it is filed, and the frame of the bill.[31] A cause is not revived until an order of revivor has been entered.[32]

§ 182. Bills in the nature of bills of revivor in general. A bill in the nature of a bill of revivor is a bill filed "to obtain the benefit of a suit after abatement in certain cases which

[19] Nanney v. Tottey, 11 Price, 117.
[20] Gunnell v. Bird, 10 Wall. 304, 308; Fretz v. Stover, 22 Wall. 198, 204.
[21] Langley v. Overton, 10 Sim. 845.
[22] Wagstaff v. Bryan, 1 R. & M. 28.
[23] Daniell's Ch. Pr. (2d Am. ed.) 1712.
[24] Wagstaff v. Bryan, 1 R. & M. 28; Daniell's Ch. Pr. (2d Am. ed.) 1712.
[25] Daniell's Ch. Pr. (2d Am. ed.) 1712.
[26] Catton v. Earl of Carlisle, 5 Madd. 427; Daniell's Ch. Pr. (2d Am. ed.) 1712.
[27] Daniell's Ch. Pr. (2d Am. ed.) 1711, 1712.
[28] Pruen v. Lunn, 5 Russ. 8; Daniell's Ch. Pr. (2d Am. ed.) 1713.
[29] Mitford's Pl., ch. 1, § 8; Daniell's Ch. Pr. (2d Am. ed.) 1713.
[30] Daniell's Ch. Pr. (2d Am. ed.) 1713; Mitford's Pl., ch. 1, § 8.
[31] Bettes v. Dana, 2 Sumn. 388.
[32] Atterbury v. Gill, 13 Off. Gaz. 276.

do not admit of a continuance of the original bill."[1] "If the death of a party whose interest is not determined by his death is attended with such a transmission of his interest that the title to it, as well as the person entitled, may be litigated in the court of chancery," as in the case of a devise[2] or conveyance[3] of real estate, "the suit is not permitted to be continued by a bill of revivor. An original bill upon which the title may be litigated must be filed, and this bill will so far have the effect of a bill of revivor that if the title of the representative substituted by the act of the deceased party is established, the same benefit may be had of the proceedings upon the former bill as if the suit had been continued by a bill of revivor."[4] "The bill is said to be original merely for want of that privity between the party to the former and the party to the latter bill, though claiming the same interest, which would have permitted the continuance of the suit by bill of revivor. Therefore, when the validity of the alleged transmission of interest is established, the party to the new bill shall be equally bound by, or have advantage of the proceedings in the original bill, as if there had been such a privity between him and the party to the original bill claiming the same interest; and the suit is considered as pending from the time of the filing of the original bill, so as to save the statute of limitations, to have the advantage of compelling the defendant to answer before an answer can be compelled to a cross-bill, and every other advantage which would have attended the institution of the suit by original bill, if it could have been continued by bill of revivor merely."[5] So the pleadings filed and any testimony taken in the original cause can be used in the same manner in the second cause after a bill in the nature of a bill of revivor has been filed.[6] Such a bill can only be filed for the purpose of bringing in a person who claims in privity with the party whose death caused the abatement.[7] Thus, if a bill is filed by

§ 182. [1] Mitford Pl., ch. 1, § 8. See Slack v. Walcott, 3 Mason, 508, 512; Sharon v. Terry, 36 Fed. R. 337, 353.

[2] Slack v. Walcott, 3 Mason, 508.

[3] Sharon v. Terry, 36 Fed. R. 337.

[4] Mitford's Pl., ch. 1, § 8. See Slack v. Walcott, 3 Mason, 508.

[5] Mitford's Pl., ch. 1, § 8.

[6] Slack v. Walcott, 3 Mason, 508; Vattier v. Hinde, 7 Pet. 252, 266; Story's Eq. Pl., §§ 371–387; Daniell's Ch. Pr. (2d Am. ed.) 1719.

[7] Daniell's Ch. Pr. 1720; Story's Eq. Pl., § 385; Rylands v. Latouche, 2 Bligh, 585; Tonkin v. Lethbridge, G. Cooper, 43.

a devisee under a will, and afterwards a subsequent will is proved, the devisee under the second will can in no way avail himself of the proceedings in the suit; for there is no privity between him and the original plaintiff. If, however, a bill has been filed by the devisor himself for some matter concerning the estate devised, the second devisee may file a supplemental bill in the nature of a bill of revivor, even if the first devisee have already filed such a bill; for he derives his title so to do solely from the devisor independently of the first devisee.[8] The principal difference between the effect of an original bill in the nature of a bill of revivor and an original bill in the nature of a supplemental bill is that under the former the defendant is absolutely bound by the proceedings in the original suit, whereas under the latter he can avail himself of any defense which has arisen since the original bill was filed, or which he has a right to urge against the new complainant, although it did not exist against the original plaintiff.[9] When the court had jurisdiction of the original suit, a want of difference of citizenship between the parties to the bill in the nature of a bill of revivor will not be a defect in it.[10]

§ 183. Frame of bills in the nature of bills of revivor and proceedings upon them.— A bill in the nature of a bill of revivor "must state the original bill, the proceedings upon it, the abatement, and the manner in which the interest of the party dead has been transmitted; and it must charge the validity of the transmission, and state the rights which have accrued by it."[1] It usually prays that the original suit may be revived, and the party filing it have the benefit of the former proceedings therein.[2] Probably a subpœna issued in accordance with its prayer may be served upon the attorney of an absent defendant, who had already appeared, in the same manner as a subpœna upon a bill filed to stay proceedings at law.[3] Otherwise the form and the proceedings upon bills in the nature of bills of revivor are the same as those upon bills of revivor;[4]

[8] Oldham v. Eboral, Cooper, Select Cas. 27.

[9] Fulton v. Greacen, 44 N. J. Eq. 443.

[10] Clarke v. Mathewson, 12 Pet. 164; s. c., 2 Sumn. 262; Minnesota Co. v. St. Paul Co., 2 Wall. 609.

§ 183. [1] Mitford's Eq. Pl., ch. 1, § 3.

[2] Daniell's Ch. Pr. 1721; Story's Eq. Pl., § 886.

[3] Norton v. Hepworth, 1 Hall & Tw. 158; Dunn v. Clarke, 8 Pet. 1, 2. See § 96.

[4] Daniell's Ch. Pr. 1720, 1721; Rule 56.

and the difference between the two is practically one of mere nomenclature.[5]

§ 184. Bills of revivor and supplement.— A bill of revivor and supplement is a bill which revives a suit after an abatement, and at the same time supplies a defect which has arisen in it since its institution.[1] Thus, where by the death of a defendant new rights accrue to the plaintiffs, a bill of revivor and supplement is necessary to state those rights;[2] and where, in a suit to restrain the infringement of a patent, the complainant assigned his interest and died, it was held improper for the assignee to revive the suit by a bill of revivor, the court saying that a "supplemental bill," but evidently intending thereby a bill of revivor and supplement, must be filed.[3] It has been held in England that by such a bill a defect apparent upon the face of the original bill cannot be cured.[4] A bill of revivor and supplement is merely a compound of a bill of revivor and a supplemental bill, and in its separate parts must be framed and proceed in the same manner.[5] It seems that it may be held good as to the revivor, and bad as to the supplemental matter.[6] All parties to the original bill should be made parties to a bill of revivor and supplement, although a revivor is sought against but one defendant.[7] A bill may be sustained upon demurrer where its allegations are sufficient to support equitable relief, whether properly or not styled a bill of revivor and supplement.[8]

§ 185. Supplemental bills in the nature of bills of revivor. A supplemental bill in the nature of a bill of revivor is a bill filed to cure an abatement when the person by or against whom the suit is to be continued, although claiming under the individual whose death caused the abatement, is not the representative whom the law allows to be recognized, but is one whose

[5] Grew v. Breen, 12 Met. (Mass.) 369.

§ 184. [1] Mitford's Pl., ch. 1, § 2; Story's Eq. Pl., §§ 387, 627; Daniell's Ch. Pr. (2d Am. ed.) 1722, 1723.

[2] Westcott v. Cady, 5 J. Ch. (N. Y.) 334, 342.

[3] Metal S. Co. v. Crandall, 18 Off. Gaz. 1531.

[4] Bampton v. Birchall, 5 Beav. 330; s. c. on appeal, 1 Phil. 568.

[5] Mitford's Pl., ch. 1, § 8; Story's Eq. Pl., §§ 387, 627; Daniell's Ch. Pr. 1722, 1723; Pendleton v. Fay, 3 Paige (N. Y.), 204.

[6] Randolph v. Dickerson, 5 Paige (N. Y.), 517. But see Bampton v. Birchall, 5 Beav. 330; s. c. on appeal, 1 Phil. 568.

[7] Lake v. Austwick, 4 Jur. 314.

[8] Shainwald v. Lewis, 69 Fed. R. 487. But see Campbell v. City of New York, 35 Fed. R. 14.

title could not have been litigated in the English Court of Chancery, but might have been disputed before another tribunal.[1] It has also been held that where during the pendency of a suit a trustee died, and the court appointed a successor to him, the new trustee could only be brought in by a supplemental bill in the nature of a bill of revivor.[2] Upon the death of a trustee or assignee in bankruptcy or insolvency his successor is brought in by a bill of this character.[3] Where one of the complainants died leaving a will, which was proved in a foreign country, a motion of his executor and testamentary trustee to revive the suit upon a bill in the nature of a bill of revivor was denied with leave to him and the decedent's devisees to file a supplemental bill.[4] Such a bill, however, although designated as being in the nature of a bill of revivor, is neither more nor less than a supplemental bill.[5]

§ 186. What renders a suit defective.— If, after the institution of a suit in equity, a person who is a necessary party thereto comes into being, or any other event occurs, which, without abating the suit, occasions such an alteration in the interest of any of the original parties, or gives any person not a party such an interest therein, as makes it necessary that the change of interest shall be brought to the attention of the court, and the person not already a party brought before it, the suit is said to become defective.[1] The circumstances causing the change of interest must then be alleged, and the new party brought in by a supplemental bill, or a bill in the nature of a supplemental bill.[2] An assignment, whether voluntary[3] or by operation of law,[4] during the pendency of a suit, of the whole or a part of a party's interest therein, does not make the suit defective, nor affect the rights of the other parties, since the assignee takes the same rights and is subject to the same obligations as his assignor, and is equally bound or ben-

§ 185. [1] Daniell's Ch. Pr. (2d Am. ed.) 1721.

[2] Greenleaf v. Queen, 1 Pet. 138, 148.

[3] Daniell's Ch. Pr. (2d Am. ed.) 1721.

[4] Currell v. Villars, 72 Fed. R. 330.

[5] Daniell's Ch. Pr. (2d Am. ed.) 1721.

§ 186. [1] Jones v. Jones, 3 Atk. 217; Mitford's Pl., ch. 1, § 3; Daniell's Ch. Pr. (2d Am. ed.) 1663.

[2] Jones v. Jones, 3 Atk. 217; Mitford's Pl., ch. 1, § 3; Daniell's Ch. Pr. (2d Am. ed.) 1663.

[3] Ex parte Railroad Co., 95 U. S. 221; Hazelton T. B. Co. v. Citizens' Street Ry. Co., 72 Fed. R. 325.

[4] Hewett v. Norton, 1 Woods, 68; Eyster v. Gaff, 91 U. S. 521.

efited by the decree. The assignee need not, therefore, be made a party,[5] unless the assignment disables the assignor from performing the decree of the court, when he should be brought before it;[6] but he may at any time be brought in at his own request.[7] It has been said that a person entitled to the benefit of a decree by his subsequent acquisition of an interest in the subject-matter in controversy is not entitled to invoke the aid of the court or take further action until he has made himself a party by a supplemental bill or other appropriate pleading, and has thus brought in the representatives or successors in interest of the original parties, plaintiff or defendant.[8] In a case in admiralty, it was held that a suit brought in the name of Napoleon III., on account of an injury to property,— a French ship held by him in his sovereign capacity,— did not abate by his deposition and the succession of the French Republic to the French Empire, and that the name of the plaintiff could at any time be changed by order.[9]

§ 187. Supplemental bills.— A supplemental bill, according to Lord Redesdale, is merely an addition to the original bill.[1] At first supplemental bills were filed, not only for the purposes mentioned in the last section, but also to supply such defects as might have been cured by amendment after the time to perfect a bill by amendment had expired.[2] Now, however, that amendments may be allowed at any stage of a suit,[3] they are no longer needed for that purpose; and as the fact that the matter pleaded in a supplemental bill may be inserted in the original bill by amendment, was also a good ground of demurrer,[4] it is doubtful whether they can be any longer so used.[5]

[5] Eyster v. Gaff, 91 U. S. 521; Ex parte Railroad Co., 95 U. S. 221.

[6] Daniell's Ch. Pr. (2d Am. ed.) 1664.

[7] Foster v. Deacon, Mad. & Geld. 59; Eyster v. Gaff, 91 U. S. 521; Ex parte Railroad Co., 95 U. S. 221, 226; *infra*, § 190.

[8] Secor v. Singleton, 41 Fed. R. 725, 726; *infra*, § 190.

[9] The Sapphire, 11 Wall. 164. See Allen v. The Mayor, 7 Fed. R. 483; s. c., 18 Blatchf. 239; Hemingway v. Stansell, 106 U. S. 399, 402.

§ 187. [1] Mitford's Pl., ch. 1, § 2.

[2] Mitford's Pl., ch. 1, § 3; Daniell's Ch. Pr. (2d Am. ed.) 1653–1663; Story's Eq. Pl., § 334; Jenkins v. Eldredge, 3 Story, 299; Mosgrove v. Kountze, 14 Fed. R. 315.

[3] Rule 29.

[4] Mitford's Pl., ch. 2, § 2, part 1; Daniell's Ch. Pr. (2d Am. ed.) 1681.

[5] Tubman v. Wason Mfg. Co., 44 Fed. R. 429; Electrical A. Co. v. Brush El. Co., 44 Fed. R. 602. See, however, Davies v. Williams, 1 Sim. 5; Nevada Nickel Syndicate v. National Nickel Co., 86 Fed. R. 486.

When an event happens subsequently to the filing of an original bill which gives a new interest in the matter in dispute to any person, whether or not already a party, without depriving all of the original plaintiffs suing in their own right of their interest, the defect arising from this event may be supplied by a supplemental bill.[6] A remainder-man may also, in this same manner, be made a party to a suit brought by or against a tenant in tail upon the determination of the latter's estate, and the acquisition by the former of the present interest to the property in litigation.[7] A supplemental bill which brings in a new party may be original as to him, but supplemental as to the rest.[8] If, pending a suit, a tenant in tail of an estate thereby affected by it is born;[9] or if, pending a suit against a husband and wife concerning the latter's estate, the man dies, and the wife thus acquires a new interest;[10] or if one of two or more plaintiffs suing in their own right is entirely deprived of his interest, by any other event than an assignment of it;[11] or if the interest of a sole plaintiff suing in a representative capacity entirely determines by death or otherwise, and some other person becomes entitled to the same property under the same title,[12]— the defect in the suit thereby occasioned must be cured by a supplemental bill. So, if pending a suit a party becomes a lunatic, or if pending a suit by or against a lunatic and his committee a new committee is appointed, the committee should

[6] Hobson v. McArthur, 16 Pet. 182; Daniell's Ch. Pr. 1663–1675; Story's Eq. Pl., §§ 336–348; Mitford's Pl., ch. 1, § 3. It has been held that supplemental bills may be filed to plead the removal, subsequent to the original bill, of liens which were obstacles to part of the plaintiff's claim (Sheffield & B. L. & Ry. Co. v. Newman (C. C. A.), 77 Fed. R. 787), and to plead an election to declare the principal of a mortgage due, made subsequent to the original bill to foreclose for a default in interest (Seattle, L. S. & G. Ry. Co. v. Union Tr. Co., 79 Fed. R. 179); or to plead subsequent defaults in interest. N. Y. Security & Tr. Co. v. Lincoln Stone Ry. Co., 74 Fed. R. 67. See also s. c., 77 Fed. R. 525. A bill by a surviving partner to settle the partnership affairs is a separate and distinct proceeding from a suit subsequently brought by the same party to subject real estate of the deceased partner to the payment of debts held by his heirs, and the statute of limitations cannot be avoided by styling the second bill a supplemental bill. White v. Miller, 158 U. S. 128.

[7] Lloyd v. Johnes, 9 Ves. 37; Daniell's Ch. Pr. (2d Am. ed.) 1668–1672.

[8] Mitford's Pl., ch. 1, § 3.

[9] Mitford's Pl., ch. 1, § 3.

[10] Daniell's Ch. Pr. (2d Am. ed.) 1668.

[11] Mitford's Pl., ch. 1, § 3; Daniell's Ch. Pr. (2d Am. ed.) 1664.

[12] Mitford's Pl., ch. 1, § 3; Daniell's Ch. Pr. (2d Am. ed.) 1665; Marriott v. Tarpley, 9 Sim. 279.

be brought in by a supplemental bill.[13] A supplemental bill may be filed after a decree in aid of the same; as, it has been held, by a purchaser at a foreclosure sale to enjoin an attack upon his title by proceedings in a State court after suit by privies to the original suit, such as stockholders or creditors,[14] and to enjoin the taking possession of property to which the complainant is entitled under the decree;[15] but the successor in office of a cabinet officer cannot be substituted for him in a suit for an injunction and for a decree directing the issue of a patent.[16] According to Lord Redesdale, upon the death of one suing in behalf of himself and others in the same position with him, if his representative do not choose to file a bill of revivor, any one of the class on behalf of whom he sued may revive;[17] but it seems that the more proper course would be for the one wishing to continue the suit to do so by means of a supplemental bill, which he can only obtain leave to file upon notice to the representatives of the deceased plaintiff, as well as to the defendants.[18] Where, however, a suit brought by one in a representative capacity becomes defective by his death, and another acquires the right to continue it under a different title,—as upon the death of an executor or administrator succeeded by an administrator *de bonis non*, according to Lord Redesdale and Daniell, the latter may continue by a bill of revivor,[19] according to Judge Story, only by a bill in the nature of revivor;[20] in no case by a supplemental bill. It has been held that in a case where the defendant is entitled to affirmative relief in his answer without a cross-bill, as a suit under section 4918 of the Revised Statutes, the complainant may plead in a supplemental bill any matter in defense to such a claim for affirmative relief

[13] Mitford's Pl., ch. 1, § 3; Daniell's Ch. Pr. (2d Am. ed.) 1664.

[14] Central Tr. Co. v. Western N. C. R. Co., 89 Fed. R. 24. But see Keokuk & W. R. Co. v. Scotland County, 152 U. S. 318.

[15] Root v. Woolworth, 150 U. S. 401.

[16] Warner Valley Stone Co. v. Smith, 165 U. S. 28. Assignees of defendants enjoined from using a trademark, who use the mark, but do not base their claim to use it on any rights supposed to be derived from the original defendants, cannot be brought into the original suit by supplemental bill. Dadirrion v. Gullian, 80 Fed. R. 986.

[17] Mitford's Pl., ch. 1, § 3.

[18] Houlditch v. Marquis Donnegall, 1 S. & S. 491; Dixon v. Wyatt, 4 Madd. 392; Daniell's Ch. Pr. (2d Am. ed.) 1671, 1672; Story's Eq. Pl., § 265.

[19] Mitford's Pl., ch. 2, § 3; Daniell's Ch. Pr. (2d Am. ed.) 1665; Owen v. Curzon, 2 Vern. 237; Huggins v. York Buildings Co., 2 Eq. Abr. 3, pl. 14.

[20] Story's Eq. Pl., § 332, n. 1.

that he might have pleaded by supplemental answer to a cross-bill, had one been filed.[21] A supplemental bill must not be inconsistent with the original bill. Thus, where the original bill stated that the defendants claimed to be a corporation, but were not incorporated, it was held improper to file a supplemental bill claiming relief upon the ground that the defendants were a corporation.[22] Where the original bill against a corporation prayed an injunction and, as incidental relief, a receiver, and the defendant was dissolved by proceedings in a State court, after the issue of an inquisition, but before the appointment of a receiver, a supplemental bill seeking to continue the injunction against the liquidators was held improper.[23] A defective original cannot be cured by new matter subsequently arising, set forth in a supplemental bill, such as the entry of judgment in favor of the plaintiff subsequent to his filing a creditor's bill.[24] The only exceptions to this rule are the probate of a will, or obtaining letters of administration by a party who has sued as executor or administrator.[25]

§ 188. Parties and frame of a supplemental bill.— As a general rule, all parties to the original suit must be made such to a supplemental bill filed to supply a defect in it,[1] unless such a bill be filed to bring in a mere formal defendant, or to allege matter which cannot possibly affect a decree against more than one defendant, when the others need not be made parties to it.[2] An objection for want of parties must, however, be made by demurrer, plea, answer, or when the motion for leave to file the bill is argued. It will be too late to make it at the hearing.[3] If the court had jurisdiction of the original bill it will take jurisdiction of the supplemental bill, no matter what may be the citizenship of the new parties;[4] provided at least that they have a right to sue and be sued in a Federal court.[5] A

[21] Electrical A. Co. v. Brush El. Co., 44 Fed. R. 602, 607; *supra*, §§ 154, 171.

[22] Maynard v. Green, 30 Fed. R. 643.

[23] Lang v. Louisiana Canning Co., 56 Fed. R. 675.

[24] Putney v. Whitmore, 66 Fed. R. 885; Neubert v. Massman, 37 Fla. 91, 19 S. R. 625; Heffron v. Knickerbooker, 57 Ill. App. 339; N. Y. Security & Tr. Co. v. Lincoln Street Ry. Co., 74 Fed. R. 67. But see s. c., 77 Fed. R. 525.

[25] *Supra*, § 164.

§ 188. [1] Daniell's Ch. Pr. (2d Am. ed.) 1678; Jones v. Jones, 3 Atk. 217; Dyson v. Morris, 1 Hare, 413; Jones v. Howells, 2 Hare, 342.

[2] Greenwood v. Atkinson, 5 Sim. 419: Dyson v. Morris, 1 Hare, 413; Wilkinson v. Fowkes, 9 Hare, 193; Story's Eq. Pl., § 343.

[3] Jones v. Jones, 3 Atk. 217.

[4] Minnesota Co. v. St. Paul Co., 2 Wall. 609. See § 21.

[5] See Adams Express Co. v. Denver

"supplemental bill must state the original bill, and the proceedings thereon, and if the supplemental bill is occasioned by an event subsequent to the original bill, it must state that event, and the consequent alteration with respect to the parties."[6] The equity rules provide that "it shall not be necessary in any supplemental bill to set forth any of the statements in the original suit, unless the special circumstances of the case require it."[7] This, however, although copied from an English Chancery order,[8] is merely a reaffirmance of the pre-existing practice.[9] If the bill brings in no new party, there is never any need of its containing any of the statements in the original pleadings.[10] When, however, it brings in a new party, as it is in fact original as to him, it must state enough of the former proceedings to show an equity against him.[11] This need not be averred positively; but it will be sufficient to state that such matters were alleged in the former bill or answer,[12] and only so much of the original pleadings need be averred as suffice to show an equity against the new party.[13] The prayer of a supplemental bill is adapted to the object for which it is exhibited. It formerly always concluded with a prayer for process in the usual form.[14] Whether this is now necessary when no new defendants are brought in may be doubted.[15] It should be signed by counsel, and in other respects conform to the form of an original bill.[16] A supplemental bill may be filed at any time during the progress of a suit, as well after as before a decree,[17] and even during the pendency of an appeal.[18] It

& R. G. R. Co., 16 Fed. R. 712; Omaha H. R. Co. v. Cable T. Co., 33 Fed. R. 689.

[6] Mitford's Pl., ch. 1, § 3.

[7] Equity Rule 58.

[8] See Order 47 in Chancery, of August, 1841.

[9] Daniell's Ch. Pr. (2d Am. ed.) 1675–1678.

[10] Daniell's Ch. Pr. (2d Am. ed.) 1675.

[11] Baldwin v. Mackown, 3 Atk. 817; Daniell's Ch. Pr. (2d Am. ed.) 1675, 1676.

[12] Lloyd v. Jones, 9 Ves. 37; Daniell's Ch. Pr. (2d Am. ed.) 1676.

[13] Vigers v. Lord Audley, 0 Sim. 72; Attorney-General v. Foster, 2 Hare, 81; Daniell's Ch. Pr. (2d Am. ed.) 1676, 1677.

[14] Daniell's Ch. Pr. 1680.

[15] See Shaw v. Bill, 95 U. S. 10.

[16] Daniell's Ch. Pr. (2d Am. ed.) 1680.

[17] Root v. Woodworth, 150 U. S. § 401; Central Tr. Co. v. Western N. C. R. Co., 89 Fed. R. 24; Daniell's Ch. Pr. (2d Am. ed.) 1659, 1660; Story's Eq. Pl., §§ 333, 338*a*; 2 Barbour's Ch. Pr. 167; O'Hara v. Shepherd, 3 Md. Ch. Dec. 306; Jenkins v. Eldredge, 3 Story, 299; Woodward v. Woodward, 1 Dick. 33; Dormer v. Fortesque, 3 Atk. 124; Secor v. Singleton, 41 Fed. R. 725.

[18] Woodward v. Woodward, 1 Dick. 33.

seems, however, that if the matters which make it necessary or advisable were known to the party filing it before the entry of the decree, afterwards it will be too late;[19] though such an objection must be taken before the hearing upon the supplemental bill.[20]

§ 189. Proceedings upon supplemental bills.— "Whenever any suit in equity shall become defective from any event happening after the filing of the bill (as, for example, by change of interest in the parties), or for any other reason a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court on any rule-day, upon proper cause shown and due notice to the other party. And if leave is granted to file such a supplemental bill, the defendant shall demur, plead, or answer thereto, on the next succeeding rule-day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by a judge of the court."[1] The petition for leave to file such a bill need not state the averments which are intended to be inserted therein; but must state sufficient to advise the opposite parties and the court of the ground upon which the relief is sought.[2] It has been held that upon the return of the order to show cause an objection which is a proper ground for a demurrer cannot be raised.[3] The objection that a supplemental bill was filed without leave is not a ground of demurrer, but only for a motion to dismiss which rests in the discretion of the court.[4] A motion will not lie to take a supplemental bill off the file for irregularity upon the ground that it does not state supplemental matter.[5] The proper course in such a case is to demur, or to object to the order allowing it to be filed.[6] Such a motion might, however, be granted if a bill filed should be different from that which the order allowed. A supplemental bill filed without leave may by a subsequent order be allowed to remain on file.[7]

[19] Pendleton v. Fay, 3 Paige (N. Y.), 204; Story's Eq. Pl., § 338a.

[20] Fulton Bank v. N. Y. & S. C. Co., 4 Paige (N. Y.), 127.

§ 189. [1] Equity Rule 57.

[2] Parkhurst v. Kinsman, 2 Blatchf. C. C. 72.

[3] Oregon & Trans. Co. v. N. Pac. Ry. Co., 32 Fed. R. 428.

[4] Henry v. Travelers' Ins. Co., 45 Fed. R. 299, 303.

[5] Bowyer v. Bright, 13 Price, 316; Daniell's Ch. Pr. (2d Am. ed.) 1682.

[6] Ibid.

[7] Mackintosh v. Flint & P. M. R. Co., 34 Fed. R. 582.

No subpœna need be issued upon such a bill unless new defendants are to be brought in; and then they only need be served with process.[8] Such a subpœna is in the same form as one issued upon the filing of an original bill, except that it specifies the nature of the bill upon which it is issued.[9] A demurrer to a supplemental bill is in general subject to the same rules, except as to time of filing the same, and will lie for the same reasons as if the bill were original;[10] but there are some grounds of demurrer peculiar to bills of this class. Thus, a demurrer will lie if it appears upon the face of the bill that it pleads matters which occurred before the institution of the suit, and which it is not too late to insert by amendment into the original bill.[11] A supplemental bill is demurrable where it shows on its face that the plaintiff knew the facts therein alleged before his time to amend had expired.[12] A supplemental bill is demurrable if when filed after a decree for an account it pleads matter which it shows that the plaintiff knew before the decree.[13] A supplemental bill is demurrable when filed to introduce a claim founded upon a title entirely distinct from that in the original bill; as, when a man first sued claiming as heir-at-law, and afterwards sought by supplemental bill to plead a purchase of the interest of the true heir-at-law.[14] A supplemental bill is demurrable if it is brought against a person who neither has nor claims any interest in the subject-matter of the original suit.[15] In a suit to restrain the infringement of a patent, "where the patent expires and is extended pending the litigation, and the infringement by the respondent is continued in respect to the extended patent, a supplemental bill is a proper pleading to prolong the suit, as in that state of the case the complainant may well claim, if he is the original and first inventor of the improvement, to recover of the respondent the gains and profits made by the infringement, both

[8] Shaw v. Bill, 95 U. S. 10, 14.

[9] Daniell's Ch. Pr. (2d Am. ed.) 1680.

[10] Daniell's Ch. Pr. (2d Am. ed.) 1681; Secor v. Singleton, 41 Fed. R. 725.

[11] Mitford's Pl., ch. 2, § 2, part 1; Story's Eq. Pl., § 614; Stafford v. Howlett, 1 Paige (N. Y.), 200.

[12] Henry v. Travelers' Ins. Co., 45 Fed. R. 299, 302.

[13] Henry v. Travelers' Ins. Co., 45 Fed. R. 299, 303.

[14] Tonkin v. Lethbridge, G. Cooper, 43; Daniell's Ch. Pr. (2d Am. ed.) 1681.

[15] Baldwin v. Mackown, 3 Atk. 817; Mitford's Pl., ch. 2, § 2, part 1; Daniell's Ch. Pr. (2d Am. ed.) 1681.

before and subsequent to the extension; but the rule is otherwise where the original patent is surrendered, as the effect of the surrender is to extinguish the patent, and hence it can no more be the foundation for the assertion of a right than can a legislative act which has been repealed without any saving clause of pending actions. Consequently, the infringement of the reissued patent becomes a new cause of action for which, in the absence of any agreement or implied acquiescence of the respondent, no remedy can be had except by the commencement of a new suit."[16] Where, however, the defendant made no objection to the complainant's filing a supplemental bill setting forth an infringement of the reissued patent, but filed to it a plea similar to that which he had previously filed to the original bill, it was held that he had waived his right to object upon appeal that the suit was improperly continued, and that an original bill should have been filed.[17] After the complainant had finished taking testimony in a suit for the infringement of a patent and an account, he was allowed to file a supplemental bill setting up infringements which had occurred after the filing of the original bill.[18]

Any objections to a supplemental bill which do not appear upon its face may be taken by plea or answer, which, in general, are subject to the same rules as pleas and answers to original bills.[19] If a defendant has not answered the original bill, his successor may be called upon in the supplemental bill to do so.[20] When that is done, the usual course is to include the answer to the original and that to the supplemental bill in the same pleading,[21] although it is not absolutely irregular to separate them.[22] A defense cannot be pleaded to a supplemental bill which has previously been pleaded to the original bill and overruled.[23] If the plaintiff wish to join issue upon averments in the answer, he may file a replication to it.[24] If there has been no replication filed in the original suit, however, a single

[16] Clifford, J., in Reedy v. Scott, 23 Wall. 352, 364, 365. See also Fry v. Quinlan, 13 Blatchf. 205; Jones v. Barker, 11 Fed. R. 597. But compare Woodworth v. Stone, 3 Story, 749; Reay v. Raynor, 19 Fed. R. 308.

[17] Reedy v. Scott, 23 Wall. 352.

[18] Turrell v. Spaeth, 9 Off. Gaz. 1163.

[19] Daniell's Ch. Pr. (2d Am. ed.) 1682.

[20] Vigers v. Lord Audley, 9 Sim. 408.

[21] Vigers v. Lord Audley, 9 Sim. 408.

[22] Sayle v. Graham, 5 Sim. 8.

[23] Pentlarge v. Pentlarge, 22 Fed. R. 412.

[24] Daniell's Ch. Pr. (2d Am. ed.) 1683; Perkins v. Hendryx, 31 Fed. R. 522.

general replication will apply to the whole record, and put at issue the allegations in both answers.[25] If the new matter in the supplemental bill is not admitted, it must be proved, or the bill will be dismissed with costs.[26] For this purpose evidence may be taken and a hearing had as upon an original bill.[27] If there has been no previous hearing and decree, both bills may be brought to a hearing together, and a single decree will suffice for both.[28] If the supplemental bill is heard alone, the evidence taken in the original suit may be read in support of or in opposition to it.[29] The effect of a supplemental bill when sustained is to put the suit in the same condition as if the supplemental matter had been alleged, and the new party, if any, brought in at its institution.[30] A bill improperly styled a supplemental bill was dismissed upon a demurrer, which specified that objection, although it might have been sustained as a bill in the nature of a supplemental bill.[31]

§ 190. Bills in the nature of supplemental bills in general. A bill in the nature of a supplemental bill is a bill filed to obtain the benefit of a suit, either after an abatement which cannot be cured by a bill of revivor or a bill in the nature of a bill of revivor, or after the suit has become defective in cases which do not admit of a supplemental bill to supply that defect.[1] Cases frequently occur in practice where the interest of an original party to a suit is completely determined, and another person becomes interested in the subject-matter by a title not derived from the other, but in such a manner as to make it proper that the benefit of the former proceedings should be had by or against the latter, without incurring the expense of commencing an entirely new proceeding. In such a case, the benefit of the former proceedings may be obtained by means of a bill called an original bill in the nature of a

[25] Catton v. Earl of Carlisle, 5 Madd. 427.

[26] Daniell's Ch. Pr. (2d Am. ed.) 1683; Pedrick v. White, 1 Met. (Mass.) 76.

[27] Lloyd v. Johnes, 9 Ves. 27; Daniell's Ch. Pr. (2d Am. ed.) 1683.

[28] Mitford's Pl., ch. 1, § 3; Daniell's Ch. Pr. (2d Am. ed.) 1684, 1685.

[29] Daniell's Ch. Pr. (2d Am. ed.) 1684; Turrell v. Spaeth, 9 Off. Gaz. 1663.

[30] Daniell's Ch. Pr. (2d Am. ed.) 1666, 1667.

[31] Campbell v. City of New York, 35 Fed. R. 14. But see Ross v. City of Ft. Wayne, 58 Fed. R. 404, 406.

§ 190. [1] Mitford's Pl., ch. 1, § 3; Campbell v. New York, 35 Fed. R. 14; Tappan v. Smith, 5 Biss. 73. But see Secor v. Singleton, 41 Fed. R. 725, 726.

supplemental bill, or a bill in the nature of a supplemental bill.[2] Such a bill must also be filed to bring into a suit the assignee of a sole plaintiff who had acquired his interest during its pendency.[3] The reason given for this is the doctrine of maintenance, in consequence of which "it is not enough for the new plaintiff to state that his assignor instituted a suit and assigned to him the benefit of it; he must show that his assignor had the property in respect of which the suit was instituted, and that that property has been assigned and carries with it the right to sue."[4] Such a bill may be brought by the assignee of the complainant to a bill to enjoin the infringement of a patent and for an account of profits and damages, although the assignment was made, and the bill in the nature of a supplemental bill was filed, after the expiration of the patent, pending the suit, and merely for the purpose of collecting damages.[5] The assignee of a decree for an injunction and an account of damages caused by the infringement of a trademark may have the benefit of the suit by filing an original bill in the nature of a supplemental bill.[6] Neither such a bill nor a supplemental bill will be sustained when filed by a purchaser of a railroad at a foreclosure sale to obtain the benefit of a decree enjoining the collection of taxes obtained by stockholders in a suit brought subsequent to the mortgage.[7] So where a defendant dies before appearance or a decree against him *pro confesso*, his successor can only be brought in by a bill in the nature of a supplemental bill, which, however, is considered merely supplemental as to the other defendants.[8] Such a bill may be filed by a purchaser of the complainant's interest even after a decree;[9] but where the purchase was made

[2] Daniell's Ch. Pr. (2d Am. ed.) 1685; Mitford's Pl., ch. 1, § 8.

[3] Daniell's Ch. Pr. (2d Am. ed.) 1667; Campbell v. New York, 35 Fed. R. 14; Ross v. City of Ft. Wayne, 58 Fed. R. 404; s. c. on appeal, 65 Fed. R. 466; Tappan v. Smith, 5 Biss. 78. But see Hoxie v. Carr, 1 Sumn. 173; Sedgwick v. Cleveland, 7 Paige (N. Y.), 290.

[4] White on Supplement and Revivor, 126, 174; Daniell's Ch. Pr. (2d Am. ed.) 1667.

[5] Ross v. City of Ft. Wayne, 58 Fed. R. 404; s. c. on appeal, 63 Fed. R. 466.

[6] Walter Baker & Co. v. Baker, 89 Fed. R. 673. But see New York B. & P. Co. v. N. J. C. S. & R. Co., 47 Fed. R. 504.

[7] Keokuk & S. W. R. Co. v. Scotland County, 152 U. S. 317.

[8] U. S. v. Fields, 4 Blatchf. 326; Crowfoot v. Mander, 9 Sim. 396; Asbee v. Shipley, M. & G. 296; Daniell's Ch. Pr. (2d Am. ed.) 1673.

[9] Walter Baker & Co. v. Baker, 89

after a direction for a decree, the bill should not be filed until after the decree is entered.[10]

§ 191. Frame of a bill in the nature of a supplemental bill. A bill in the nature of a supplemental bill "must state the original bill, the proceedings upon it, the event which has determined the interest of the party by or against whom the former bill was exhibited, and the manner in which the property has vested in the person become entitled. It must then show the ground upon which the court ought to grant the benefit of the former suit to or against the person so become entitled, and pray the decree of the court adapted to the case of the plaintiff in the new bill."[1] It will not be impertinent for it to restate allegations of the bill or answer in the original suit, nor to charge new matter which occurred before the original bill was filed, for the purpose of meeting a defense in the original answer.[2] But a bill in the nature of a supplemental bill need contain no more of the allegations in the original bill than suffices to show a cause of action against the defendants to it.[3] Otherwise, its form should be, as far as possible, in compliance with that of an original bill. If, however, its object be merely to obtain the benefit of the proceedings in the original suit, the want of the difference of citizenship necessary to support an independent original bill will not deprive the court of jurisdiction of it, provided the first suit were properly brought.[4]

§ 192. Proceedings upon bills in the nature of supplemental bills.— A bill in the nature of a supplemental bill is filed in the same manner as a supplemental bill, and the same rule governs the time of the filing of pleadings to it.[1] Otherwise, proceedings upon bills in the nature of supplemental bills resemble those upon independent original bills.[2] According to Lord Redesdale, "a new defense may be made; the pleadings

Fed. R. 673; Hazleton T. R. Co. v. Citizens' St. Ry. Co., 72 Fed. R. 325.

[10] Hazleton T. R. Co. v. Citizens' St. Ry. Co., 72 Fed. R. 325.

§ 191. [1] Mitford's Pl., ch. 1, § 3.

[2] Woods v. Woods, 10 Sim. 197; Atty. Gen. v. Foster, 2 Hare, 81; Daniell's Ch. Pr. (2d Am. ed.) 1667, 1668.

[3] Daniell's Ch. Pr. (2d Am. ed.) 1675-1677; Vigers v. Lord Audley, 9 Sim. 72.

[4] Minnesota Co. v. St. Paul Co., 2 Wall. 609.

§ 192. [1] Rule 57. See § 189.

[2] Mexican Ore Co. v. M. G. M. Co., 47 Fed. R. 351, 356.

and depositions cannot be used in the same manner as if filed or taken in the same cause; and the decree, if any has been obtained, is no otherwise of advantage than as it may be an inducement to the court to make a similar decree."[3] As has been remarked by Lord Eldon, this passage contains an obscurity of language which is due to an obscurity in the subject.[4] But the probable meaning and the view of the matter best supported by authority are, that upon the filing of what is called a bill in the nature of a supplemental bill, no further benefit of the proceedings in the original suit can be obtained than would be if it were styled merely an original bill; and the evidence and admissions and the benefit of the decree in the former suit will only be allowed when the parties to the second are in privity with those to the first suit.[5]

[3] Mitford's Pl., ch. 1, § 3.
[4] Lloyd v. Johnes, 9 Ves. 37, 56.
[5] Daniell's Ch. Pr. (2d Am. ed.) 1685, 1688; Great Western Tel. Co. v. Purdy, 162 U. S. 329.

CHAPTER XV.

INTERLOCUTORY APPLICATIONS AND PETITIONS.

§ 193. Definition and classification of interlocutory applications.— An interlocutory application is a request, not incorporated in a bill, made to the court for its interference in a matter arising in a cause either before or after a decree. An interlocutory application is made by motion on petition.

§ 194. Definition and classification of motions.— A motion has been defined as "an application either by a party or his counsel, not founded upon any written statement addressed to the court."[1] But the rules of the Supreme Court of the United States provide that "all motions hereafter made to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion."[2] And most motions are supported by affidavits. Motions are either of course or special. Special motions are either *ex parte* or upon notice.

§ 195. Motions of course.— Motions of course are those which, by some rule or practice of the court, are invariably granted without notice, and to which no opposition is allowed.[1] In Federal equity practice, the term is usually confined to such motions as are granted as of course by the clerk without the intervention of a judge of the court.[2] The equity rules provide that "all motions and applications in the clerk's office for the issuing of mesne process and final process to enforce and execute decrees; for filing bills, answers, pleas, demurrers, and other pleadings; for making amendments to bills and answers; for taking bills *pro confesso;* for filing exceptions; and for other proceedings in the clerk's office which do not by the rules hereinafter prescribed require any allowance or order of the

§ 194. [1] Daniell's Ch. Pr. (2d Am. ed.) 1787. See the language of Folger, J., in Shaft v. Phœnix Mut. L. Ins. Co., 67 N. Y. 544, 547.

[2] Supreme Court Rule 6.

§ 195. [1] Daniell's Ch. Pr. (2d Am. ed.) 1599; U. S. v. Parrott, 1 McAll. 447, 454.

[2] Robinson v. Satterlee, 3 Saw. 134, 141.

court, or of any judge thereof, shall be deemed motions and applications grantable of course by the clerk of the court. But the same may be suspended, or altered, or rescinded by any judge of the court, upon special cause shown."[3] The order dismissing a bill for an omission to duly file a replication is an order as of course.[4] It has been held that an order for the issue of a commission is not.[5] "The clerk's office shall be open, and the clerk shall be in attendance therein, on the first Monday of every month, for the purpose of receiving, entering, entertaining, and disposing of all motions, rules, orders, and other proceedings, which are grantable of course and applied for, or had by the parties or their solicitors, in all causes pending in equity, in pursuance of the rules hereby prescribed."[6] "All motions, rules, orders, and other proceedings made and directed at chambers, or on rule-days at the clerk's office, whether special or of course, shall be entered by the clerk in an order-book, to be kept at the clerk's office, on the day when they are made and directed, which book shall be open at all office hours to the free inspection of the parties in any suit in equity, and their solicitors. And, except in cases where personal or other notice is specially required or directed, such entry in the order-book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices, and other proceedings entered in such order-book, touching any and all the matters in the suit to and in which they are parties and solicitors."[7]

§ 196. Special motions without notice.— A special motion is a motion which can only be granted by a judge of the court under special circumstances or in his discretion.[1] Such motions are either upon notice or without notice. Orders granted upon motions without notice are said to be *ex parte;* and the same term is applied to the motions upon which they are granted. An *ex parte* special motion must be supported by an affidavit.[2] *Ex parte* special motions are not common.[3] They are usually

[3] Equity Rule 5.
[4] Robinson v. Satterlee, 3 Saw. 134, 141.
[5] U. S. v. Parrott, 1 McAll. 447.
[6] Rule 2.
[7] Rule 4.

§ 196. [1] Daniell's Ch. Pr. (2d Am. ed.) 1789; U. S. v. Parrott, 1 McAll. 447, 454.
[2] Daniell's Ch. Pr. (2d Am. ed.) 1789.
[3] McLean v. Lafayette Bank, 3 McLean, 503; U. S. v. Parrott, 1 McAll.

granted to prevent some irreparable injury to the moving party which would otherwise occur within the time limited for notice, when the same is required; and the court should always lend a willing ear to an application to discharge or set aside an *ex parte* order.[4] Writs of *ne exeat republica* are usually granted *ex parte*.[5] So are applications for extensions of time to plead, or take other proceedings in a cause. The equity rules provide that "Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance, and plead, demur, or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled as of course, upon motion, without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party by the court in term, or by a judge thereof in vacation, after a hearing, which may be *ex parte*, if the adverse party does not appear at the time and place ordered. In every case where an injunction — either the common injunction or the special injunction — is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some other order of the court."[6] The Revised Statutes, however, make an exception to this rule, in providing that "whenever notice is given of a motion for an injunction out of a Circuit or District Court, the court or a judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion; and such order may be granted with or without security, in the discretion of the court or judge."[7] The rule was, moreover, thus construed by Mr. Justice Miller: "The justices of the Supreme Court have power to grant injunctions which do not expire by the commencement of the next succeeding term. To injunctions thus granted, the latter part of the rule applies, namely,— that they continue until dissolved by some other order of the court. To injunc-

447; Marshall v. Mellersh, 5 Beav. 496; Gray v. C., L & N. R. Co., 1 Woolw. 68.

[4] Daniell's Ch. Pr. (2d Am. ed.) 1789, 1790; Isnard v. Cazeaux, 1 Paige (N. Y.), 89; Hart v. Small, 4 Paige (N. Y.), 551.

[5] Collinson v. ——, 18 Ves. 353; Daniell's Ch. Pr. (2d Am. ed.) 1789, 1937.

[6] Rule 55. See also Yuengling v. Johnson, 1 Hughes, 607.

[7] U. S. R. S., § 718. See *infra*, §§ 230, 231.

tions granted by the judges of the District Courts, the other alternative of the disjunctive sentence applies, merely reiterating the provision of the statute, that they continue till the next term of the court, unless otherwise ordered by the court."[8] *Ex parte* orders may be obtained at any time and in any place within the jurisdiction of the judge, whether in court or elsewhere.[9]

§ 197. Notice of motion.— The equity rules provide that "all motions for rules or orders and other proceedings, which are not grantable of course or without notice, shall, unless a different time be assigned by a judge of the court, be made on a rule-day, and entered in the order-book, and shall be heard at the rule-day next after that on which the motion is made. And if the adverse party, or his solicitor, shall not then appear, or shall not show good cause against the same, the motion may be heard by any judge of the court *ex parte*, and granted, as if not objected to, or refused, in his discretion."[1] "Any judge of the Circuit Court, as well in vacation as in term, may, at chambers, or on the rule-days at the clerk's office, make and direct all such interlocutory orders, rules, and other proceedings, preparatory to the hearing of all causes upon their merits, in the same manner and with the same effect as the Circuit Court could make and direct the same in term, reasonable notice of the application therefor being first given to the adverse party, or his solicitor, to appear and show cause to the contrary, at the next rule-day thereafter, unless some other time is assigned by the judge for the hearing."[2] It has been held that the foregoing rule does not apply to a motion made in term and in the presence of counsel for the opposing side.[3] "Except in cases where personal or other notice is specially required or directed, such entry in the order-book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices and other proceedings, entered in such order-book, touching any and all matters in the suits to and in which they are parties and solicitors. And notice to the solicitors shall be deemed notice

[8] Gray v. C., I. & N. R. Co., 1 Woolw. 63, 68.

[9] Daniell's Ch. Pr. (2d Am. ed.) 1789; Equity Rule 8.

§ 197. [1] Equity Rule 6.

[2] Equity Rule 8.

[3] McLean v. Lafayette Bank, 3 McLean, 503, 505.

to the parties for whom they appear and whom they represent, in all cases where personal notice on the parties is not otherwise specially required. Where the solicitors for all the parties in the suit reside in or near the same town or city, the judges of the Circuit Court may, by rule, abridge the time for notice of rules, orders, or other proceedings not requiring personal service on the parties, in their discretion."[4] This subject is usually regulated by rule or local practice differently in the several circuits. In the Circuit Court for the Southern District of New York, four days' notice personally served, together with a copy of the bill and of the affidavits intended to be used in support of the motion, is all that is usually required.[5]

All notices of motion for any process of contempt or commitment must be served personally on the party against whom the process is sought,[6] except, perhaps, when an order for substituted service has been previously obtained.[7] In England, under special circumstances, notice of a motion could be made upon an agent of a person without the jurisdiction.[8]

A notice of motion should be properly entitled in the cause or matter in which it is made.[9] It should be addressed to the solicitor of the party intended to be affected by it, or to the party himself when he appears in person or personal service is intended. It should be dated,[10] and signed by the solicitor for the moving party, or by that party himself if he appear in person.[11] It has been held in New York that a notice signed in person by a defendant who has previously appeared by a solicitor who has not been removed is irregular.[12] A notice of motion should state the day, place, and hour at which the mo-

[4] Equity Rule 4.

[5] See Rule 105 of the Rules of the U. S. C. C. for the Southern District of New York.

[6] Daniell's Ch. Pr. (2d Am. ed.) 1794; Gray v. C., L. & N. R. Co., 1 Woolw. 63; *supra*, § 96.

[7] Hope v. Hope, 4 De G., M. & G. 328.

[8] Daniell's Ch. Pr. (2d Am. ed.) 1794; Hope v. Hope, 4 De G., M. & G. 328; Cooper v. Wood, 5 Beav. 391; Pulteney v. Shelton, 5 Ves. 147; Hunt v. Lever, 5 Ves. 147; and § 96.

[9] Barb. Ch. Pr. 570; Rowlatt v. Cattell, 2 Hare, 186; Salomon v. Stalman, 4 Beav. 243; Davis v. Barrett, 7 Beav. 171; Morrall v. Prichard, 11 Jur. (N. S.) 969.

[10] Barb. Ch. Pr. 570; Moody v. Hebberd, 11 Jur. 941; Hutchinson v. Horner, 9 Jur. 615; Parker v. Francis, 9 Jur. 616, note.

[11] Barb. Ch. Pr. 570; Perry v. Walker, 4 Beav. 452.

[12] Halsey v. Carter, 6 Robertson (N. Y.), 585; Webb v. Dill, 18 Abb. Pr. (N. Y.) 264.

tion will be made.[13] It is usual, however, to designate the hour by the expression "at the opening of the court on that day," and to add the words "or as soon thereafter as counsel can be heard."[14] Where the motion can be made only by leave of the court, the notice ought to mention that it is so made; or, otherwise, it seems that it may be disregarded.[15] Where the object of the motion is to discharge an order for irregularity, it is usual for the notice to state the ground of the application.[16] It is usual for the notice also to state before what judge the motion will be made; and to specify the affidavits and other documents which will be used in its support.[17] The notice must state clearly the terms of the order which will be asked for, and everything which the party would have should be expressed; as the court will not extend the order beyond the notice.[18] For this reason, it is usual to add a notice of a motion for general relief; that is, "for such other or further order or relief as to the court shall seem just;" under which, other relief germane to that, a motion for which has been specifically noticed, may be granted.[19] A general appearance and consent to an adjournment waives a defect in a notice of motion.[20] It has been held that on the hearing of a motion for the production of papers under a subpœna *duces tecum* coupled with a prayer for general relief, if the other party appears by counsel, an order may be granted committing him, or, if a corporation, committing its officers, for contempt for disobedience to the subpœna.[21] It has been held that a motion for the appointment of a receiver cannot be made at the hearing of a motion for an injunction against an interference with a railroad claimed to be in the possession of the moving party.[22] A motion to suppress depositions brings

[13] Barb. Ch. Pr. 570; Bodwell v. Willcox, 2 Caines (N. Y.), 104; Anon., 1 J. R. (N. Y.) 148.

[14] Barb. Ch. Pr. 570; In re Electric Tel. Co. of Ireland, 10 W. R. 4.

[15] Hill v. Rimell, 8 Sim. 632; Jacklin v. Wilkins, 6 Beav. 607.

[16] Brown v. Robertson, 2 Phil. 178; Alexander v. Esten, 1 Caines (N. Y.), 152; Jackson v. Stiles, 1 Cowen (N. Y.), 134.

[17] Daniell's Ch. Pr. (2d Am. ed.) 1798; Clement v. Griffith, C. P. Coop. 470; Brown v. Ricketts, 2 J. Ch. (N. Y.) 425.

[18] Barb. Ch. Pr. 570; Mann v. King, 18 Ves. 297.

[19] Barb. Ch. Pr. 570.

[20] Marye v. Strouse, 6 Sawyer, 204.

[21] Edison El. L. Co. v. U. S. El. L. Co., 44 Fed. R. 294, 300.

[22] St. L., K. C. & C. Ry. Co. v. Dewees, 23 Fed. R. 691.

up the regularity of an *ex parte* order directing them to be taken, as well as the competency of the witnesses examined, if the party moving to suppress has never done anything to waive the objection."[23]

A motion may be made by any party to a cause except one who is in contempt.[24] It has been said, that a party in contempt cannot move for any other purpose than to discharge the contempt proceedings,[25] or to expunge scandal from the record;[26] and in such cases he should apply by petition.[27] The rule in the Federal courts, however, is that he is only debarred from applications which are not of strict right, but are matters of favor in the discretion of the court,[28] such as an application to open a default;[29] and that his answer cannot be stricken out of the record nor can he be denied a hearing.[30] No one should join in a notice for a motion in which he is not directly interested.[31] The joinder of one disinterested party with others who had an interest was held in England a sufficient reason for refusing the whole motion.[32] A motion in the course of proceedings under an information cannot be made on behalf of the relators, but only on behalf of the attorney-general or district attorney.[33] Where it is clearly for the interest of a person under a disability to make a motion, and he has no next friend, or his next friend refuses to do so, a next friend for the purposes of the application may move on his behalf.[34]

A number of objects not inconsistent with each other, and even inconsistent objects, if prayed for in the alternative, may be included in the same notice and motion.[35] The court will

[23] Bradley, J., in Eslava v. Mazange, 1 Woods, 623, 627.

[24] Daniell's Ch. Pr. (2d Am. ed.) 1787; Nicholson v. Squire, 16 Ves. 259, 260.

[25] Daniell's Ch. Pr. (2d Am. ed.) 554–558, 1787; Anon., 5 Ves. 656.

[26] Everett v. Prythergoh, 12 Sim. 363.

[27] Lord Eldon in Nicholson v. Squire, 16 Ves. 259, 260.

[28] See the learned opinion of Mr. Justice White in Hovey v. Elliott, 167 U. S. 409.

[29] Ellingwood v. Stevenson, 4 Sandf. Ch. (N. Y.) 366.

[30] Hovey v. Elliott, 167 U. S. 409. *Contra*, Walker v. Walker, 82 N. Y. 260; Pickett v. Ferguson, 45 Ark. 177, 191.

[31] Daniell's Ch. Pr. (2d Am. ed.) 1793; Folland v. Lamotte, 10 Sim. 486.

[32] Folland v. Lamotte, 10 Sim. 486.

[33] Atty. Gen. v. Wright, 3 Beav. 447.

[34] Cox v. Wright, 9 Jur. (N. S.) 981; Guy v. Guy, 2 Beav. 460; Furtado v. Furtado, 6 Jur. 227; *supra*, §§ 32, 33.

[35] Daniell's Ch. Pr. (2d Am. ed.) 1792, 1793.

discourage when directing as to costs the making of separate motions for objects which might have been conveniently obtained by a single application.[36]

§ 198. Argument of motions.— The manner of bringing motions to a hearing is regulated by local rule or usage differently in the different circuits. Lord Campbell has thus described the former English practice, which was abolished by Lord Mansfield, whose rules for the hearing of motions at common law were followed by the Court of Chancery: "Day by day during the term, each counsel when called upon had been accustomed to make as many motions successively and continuously as he pleased. The consequence was, that by the time the Attorney and Solicitor-General, and two or three other Dons, had exhausted their motions, the hour had arrived for the adjournment; and as the counsel of highest rank was again called to at the sitting of the court next morning, juniors had no opportunity of making any motions with which they might be intrusted till the last day of the term, when it was usual, as a fruitless compliment to them, to begin with the back row,— after the time had passed by when their motions could be made with any benefit to their clients. The consequence was, that young men of promise were unduly depressed, and more briefs were brought to the leaders than there was time for them to read, even had they been toiling all night at their chambers instead of sitting up in the House of Commons, absorbed in party struggles. Thus the interests of the suitors were in danger of being neglected, and the judges did not receive the fair assistance from the bar in coming to a right conclusion which they were entitled to expect. To remedy these evils, a rule was made that the counsel should only make one motion a-piece in rotation; and that if by chance the court rose before the whole bar had been gone through, the motion should begin next morning with him whose turn it was to move at the adjournment. The business was thus both more equally distributed and much better done."[1] This custom, however, if it ever did prevail, was early abolished in this country; and here usually either no method is observed, and motions are

[36] Hawke v. Kemp, 3 Beav. 288.

§ 198. [1] Campbell's Lives of the Chief Justices, ch. xxxiv, pp. 898, 899. See also Daniell's Ch. Pr. (2d Am. ed.) 1797.

made by counsel as they catch the judge's eye, or a calendar upon which motions are placed by the clerk in the order in which they were first brought to his attention, is made and called. In the Supreme Court of the United States the Attorney-General and the Solicitor-General take precedence.

When, at the hearing of a motion, the opposite party is not represented, proof of service must be shown by entry in the order-book, affidavit, or admission; and the hearing may then proceed *ex parte*.[2] When the moving party does not then appear, his motion will be dismissed. When both sides are represented, the moving party has the right of opening and replying.[3] The English rule was that, "in injunction cases, where upon an order to dissolve an injunction *nisi* the plaintiff shows cause upon the merits confessed in the answer; then no reply is allowed, the motion for the order *nisi* being considered as the application, to which the plaintiff answers by showing cause upon the merits; after this, the defendant's counsel is allowed to argue against the cause shown by the plaintiff, and this is considered as the reply."[4] As a general rule, no person can be heard in support of a motion unless he has been one of the parties who gave notice of it.[5] But when the object of a motion is to reverse the conclusion of a master, it seems that all persons interested in the master's report are entitled to be heard in its support.[6] At the hearing, if the English practice should be followed, any affidavit might be read by either party that had been filed in the clerk's office before the hearing. If an affidavit were filed too late for the other side to take a copy of it, or to obtain an affidavit controverting facts stated in it, that was a ground for moving to postpone the hearing. No affidavit filed previous to the entry of the motion could be used by the moving party, unless he had in his notice of motion stated specifically that he intended to use it. A separate notice to that effect, if served a reasonable time before the hearing of the motion, would, however, probably be sufficient.[7] This subject is, however, by local rule or custom regulated dif-

[2] Equity Rule 6.
[3] Daniell's Ch. Pr. (2d Am. ed.) 1790.
[4] Ibid.
[5] Stubbs v. Sargon, 3 Beav. 408; Daniell's Ch. Pr. (2d Am. ed.) 1793.
[6] Johnston v. Todd, 5 Beav. 394; Daniell's Ch. Pr. (2d Am. ed.) 1793.
[7] Daniell's Ch. Pr. (2d Am. ed.) 1797, 1798.

ferently in the different circuits. Affidavits upon information and belief, where the grounds of the belief are set forth, may be read in support of a motion,[8] and other proof which would be incompetent upon a trial may be used.[9] Where an order is made by which a particular act is to be done, unless the other party shall within, or rather, as is the usual American custom, at a certain time, show cause to the contrary; which order is called in England an order *nisi*, in the United States usually an order to show cause; the party obtaining it must, on the return-day, move for another order "to confirm the previous order *nisi* absolute." The motion, in this case, requires no notice, but the application must be supported by an affidavit to prove due service of the order *nisi*, similar to the proof of service of a notice of motion, unless a different mode or time of service be directed by the judge granting it.[10] By rule, in the Circuit Court for the Southern District of New York, "all special motions, in reference to matters of practice, may be made in open court, or before a judge at chambers."[11]

§ 199. Petitions in general.— A petition is a request in writing directed to the judge or judges of the court, and showing some matter or cause whereupon the petition prays some direction or order.[1] It may be made by one who is, or by one who is not, a party to a cause pending in the court. Lord Erskine said formerly: "I do not find that there are any precise or positive boundaries between motions and petitions, as they are to be applied to carry into effect decrees and orders, so as to exclude all discretion in the court to grant or refuse them, according to circumstances; but, generally speaking, motions which have for their object the giving effect to decrees or orders, should be confined to cases where the order which is to be made upon the motion arises out of recent proceedings upon which there is no doubt; for as the adverse party knows nothing but by the notice, containing only the name of the cause

[8] City of Detroit v. Detroit City Ry. Co., 54 Fed. R. 1.

[9] Casey v. Cincinnati Typographical Union No. 3, 45 Fed. R. 135, 147; Coeur d'Alene Am. Mining Co. v. Mining Union of Warden, 51 Fed. R. 260; Mercantile Trust Co. v. Texas & P. Ry. Co., 51 Fed. R. 529, 542; Buck v. Hermance, 1 Blatch. 322; Mathews v. Ironclad Mfg. Co., 19 Fed. R. 321; *infra*, §§ 232, 269, 386.

[10] Daniell's Ch. Pr. (5th Am. ed.) 1593.

[11] U. S. C. C., S. D. N. Y. Rule 111. § 199. [1] 2 Barb. Ch. Pr. 579.

and what is prayed of the court, the proceedings ought to be recent and notorious, so as that the adverse party may be supposed to be perfectly conusant of all the steps and proceedings in the cause, as much as if, at a greater expense, they were recited in the petition."[2] But petitions are now rarely filed by a party to a cause, since any relief which he desires can usually be obtained equally well by a motion supported by an affidavit containing the allegations which would be necessary in a petition. Petitions are usually filed by some person not a party in order to obtain the benefit of proceedings in a cause pending in the court, or else to obtain an order in relation to some matter which is not the subject of any litigation in it. Petitions which are made in a cause are termed cause petitions.[3] The most common instances of cause petitions are petitions for the appointment of a next friend, petitions of intervention, petitions for payment out of a fund in the hands of an officer of the court, and petitions for leave to sue a receiver. The most common instances of petitions which are not cause petitions are petitions for the appointment, removal, or resignation of a trustee, and petitions for the appointment of the guardian of an infant, and the maintenance of the infant out of his property. But in most, if not all, of these cases the application can also be made by motion, unless a long statement of facts is needed to show the right of the applicant to relief.[4] Where a petition is founded upon a former decree it is sufficient to state that decree without setting out the papers upon which that decree was rendered.[5] After a decree which purports to finally dispose of the suit, one plaintiff cannot obtain relief against another by means of a petition setting up matters which could not have been introduced by an amended or supplemental bill; at least without notice to the party against whom he seeks relief.[6] Ordinarily, a petition cannot be presented in a cause before the bill has been filed.[7] A petition for leave to sue *in forma pauperis* is an exception to this rule; and in an extraordinary case a stay order might perhaps be granted upon a

[2] Lord Shipbrooke v. Lord Hinchinbrook, 13 Ves. 387, 393. See, however, Nicholson v. Squire, 16 Ves. 259, 260.

[3] Daniell's Ch. Pr. (2d Am. ed.) 1801.

[4] Jones v. Roberts, 12 Sim. 189; Barker v. Todd, 15 Fed. R. 265.

[5] Davis v. Davis, 65 Fed. R. 880.

[6] Smith v. Woolfolk, 115 U. S. 143.

[7] Daniell's Ch. Pr. (2d Am. ed.) 1801.

petition before the filing of a bill.[8] The objection, that a party who has proceeded by a petition should have filed a cross-bill, a supplemental bill, or a supplemental answer, is too late when not taken till after an answer to the petition and a decree thereupon.[9] A paper improperly styled a petition may, if it contains the necessary allegations, be sustained as a dependent original bill.[10]

§ 200. Petitions for leave to sue in forma pauperis at common law and in equity.—"The right to sue *in forma pauperis* originated in the statute of Hen. VII. This and the subsequent statute of Hen. VIII. are confined to actions in the courts of common law, and do not extend to defendants. The courts of equity have adopted the principle of these statutes, and, proceeding further, have extended the relief to the case of defendants."[1]

The act of July 20, 1892, provides "that any citizen of the United States, entitled to commence any suit or action in any court of the United States, may commence and prosecute to conclusion any such suit or action without being required to prepay fees or costs, or give security therefor before or after bringing suit or action, upon filing in said court a statement under oath, in writing, that, because of his poverty, he is unable to pay the costs of said suit or action which he is about to commence, or to give security for the same, and that he believes he is entitled to the redress he seeks by such suit or action, and setting forth briefly the nature of his alleged cause of action."[2] "That the officers of the court shall issue, serve all process, and perform all duties in such cases, and the witnesses shall attend as in other cases, and the plaintiff shall have the same remedies as are provided by law in other cases."[3] "That the court may request any attorney of the

[8] Mayor of London v. Bolt, 5 Ves. 129; Daniell's Ch. Pr. (2d Am. ed.) 1801.

[9] Kelsey v. Hobby, 16 Pet. 269, 277; Coburn v. Cedar V. C. & L. Co., 138 U. S. 196, 222.

[10] Central Tr. Co. of N. Y. v. Marietta & N. G. R. Co., 63 Fed. R. 492.

§ 200. [1] Lord Lyndhurst in Oldfield v. Cobbett, 1 Phil. 613, 615. See Ferguson v. Dent, 15 Fed. R. 771.

[2] 27 St. at L., p. 252. Before this act, the Federal courts followed the English practice in equity, Ferguson v. Dent, 15 Fed. R. 771; not at common law, Roy v. Louisville, N. O. & T. R. Co., 34 Fed. R. 276; but in the absence of a State statute, which it followed, Heckman v. Mackey, 33 Fed. R. 57.

[3] Ibid.

court to represent such poor person if it deems the cause worthy of trial, and may dismiss any such cause so brought under this act if it be made to appear that the allegation of poverty is untrue, or if said court be satisfied that the alleged cause of action is frivolous or malicious."[4] "That judgment may be rendered for costs at the conclusion of the suit as in other cases: Provided that the United States shall not be liable for any of the costs incurred."[5]

The English practice required that such an application be made by a petition containing a short statement of his case or defense, and when filed by a complainant that it should be accompanied by a certificate signed by counsel, "that he conceives the plaintiff has just cause to be relieved touching the matter of the petition for which he has exhibited his bill;" and also in all cases by the affidavit of the party himself "that he is not worth in all the world the sum of 5*l.* after payment of his just debts, his wearing apparel and the matters in question in the cause only excepted."[6] It seems, that, under the statute of the United States, the application may be made upon a motion and affidavit without a petition or a certificate of counsel, although a prudent practitioner should not omit them. The affidavit, when filed by the plaintiff, should show that he is a citizen, and that there is no person interested who is able to pay or secure the costs.[7] An attorney who had contracted to bring a suit upon a contingent fee was held to be such an interested person.[8] Where the plaintiff sued in a representative capacity, it was held that he must show that those whom he represented were unable to pay the costs.[9] According to the English practice, a person suing or being sued in a representative capacity could not obtain an order of this character.[10] A person may take an appeal to the Supreme Court[11] or to a Cir-

[4] Ibid.

[5] Ibid.

[6] Daniell's Ch. Pr. (2d Am. ed.) 46; Wilkinson v. Belsher, 2 Brown, Ch. C. 272.

[7] Boyle v. Great N. Ry. Co., 63 Fed. R. 539.

[8] Ibid.

[9] Clay v. Southern Ry. Co. (C. C. A.), 90 Fed. R. 472.

[10] Oldfield v. Cobbett, 1 Phil. 613; Daniell's Ch. Pr. (2d Am. ed.) 44; Anon., 1 Ves. Jr. 409. But see Thompson v. Thompson, cited in 1 T. & V. Ch. Pr. 513; Ferguson v. Dent, 15 Fed. R. 771; Clay v. Southern Ry. Co. (C. C. A.), 90 Fed. R. 472.

[11] In re Mills, 135 U. S. 263; Fuller v. Montague, 58 Fed. R. 206.

cuit Court of Appeals,[12] or sue out a writ of *habeas corpus*[13] in the Supreme Court, *in forma pauperis*. After such an appeal from a decree sustaining a demurrer, it was held to be too late to move to dismiss the case for a defect in the affidavit upon the original application for leave to sue.[14] An appeal *in forma pauperis* was not allowed when it was plainly without merit.[15]

In England the counsel and solicitor assigned could not take any fee, profit, or reward of the pauper for the despatch of business, while the cause was pending and the party continued *in forma pauperis*, except paupers' fees, which were twopence a sheet for the labor of copying.[16] Nor could any agreement be made for the payment of any recompense afterwards.[17] For an offense in either of these respects, both the lawyer and the client were guilty of contempt of court; and the client was dispaupered, and forever disqualified from suing as a pauper in the same suit.[18] When it was made to appear to the court that a pauper had sold or contracted for the benefit of his suit, or any part thereof, while the same was depending, his suit was dismissed absolutely.[19] No fees except paupers' fees could be collected from the pauper, nor could costs be decreed against him,[20] except for scandal.[21] In case of success, however, the court might allow him full costs. "For though he is at no costs, or but small expense, yet the counsel and clerks do not give their labor to the defendant, but to the pauper."[22] The order permitting a party to sue or defend *in forma pauperis* had to be served upon the opposite party as soon as possible. For the pauper was liable for all costs decreed against him be-

[12] Fuller v. Montague (C. C. A., 1st Ct.), 53 Fed. R. 206; Columb v. Webster Mfg. Co., 76 Fed. R. 198. *Contra*, The Presto (C. C. A., 5th Ct.), 93 Fed. R. 522. See Wickelman v. A. B. Dick Co. (C. C. A.), 85 Fed. R. 851; Brinkley v. L. & N. R. Co., 95 Fed. R. 845, 854.

[13] In re Mills, 135 U. S. 263.

[14] Fuller v. Montague, 53 Fed. R. 206.

[15] Brinkley v. Louisville & N. R. Co., 95 Fed. R. 845, where there is a learned and instructive opinion by Judge Hammond upon the whole subject of this section.

[16] Daniell's Ch. Pr. (2d Am. ed.) 47.

[17] Ibid.

[18] Ibid.

[19] Ibid.

[20] Ibid.; Scatchmer v. Foulkard, 1 Eq. Cas. Abr. 125.

[21] Rattray v. George, 16 Ves. 232. See also Murphy v. Oldis, 2 Molloy, 475; Richardson v. Richardson, 5 Paige (N. Y.), 58.

[22] Scatchmer v. Foulkard, 1 Eq. Cas. Abr. 125; Rattray v. George, 16 Ves. 232; Daniell's Ch. Pr. (2d Am. ed.) 49, 50.

fore the service of the order.[23] A party could be dispaupered for improper or vexatious conduct in the suit.[24]

§ 201. Petitions of intervention.— A petition of intervention is filed in a pending cause by a person who is not a party to it; and prays permission to intervene and become a party, either plaintiff or defendant. The general rule is that the court has no power to allow a stranger to a cause "to be heard therein either by petition or motion, except in certain cases arising from necessity, as where the pleadings contain scandal against a stranger, or where a stranger purchases the subject of litigation pending the suit, and the like."[1] But persons belonging to a class represented in the suit are regarded as *quasi*-parties; and for that reason they are often allowed to intervene.[2] In a suit brought by a member of a class on behalf of himself and others similarly interested, another member of the class who desires the success of the complainant[3] can always intervene,[4] even after a decree for a sale, provided there has been no distribution of the assets,[5] upon payment of his share of the costs, expenses, and reasonable counsel fees which have been previously paid or incurred.[6] It has been held that, where a creditor delays his intervention until after a decision in favor of the plaintiff, the payment of his claim will be postponed until after those who have conducted the litigation have received full satisfaction.[7] Ordinarily an intervenor in a suit

[23] Ballard v. Catling, 2 Keen, 606.

[24] Wagner v. Mears, 3 Sim. 127.

§ 201. [1] Bradley, J., in Anderson v. Jacksonville, P. & M. R. Co., 2 Woods, 628, 629. See also Searles v. Jacksonville, P. & M. R. Co., 2 Woods, 621, 625; Shields v. Barrow, 17 How. 130, 145; Bronson v. Railroad Co., 2 Black, 524; Coleman v. Martin, 6 Blatchf. 119; Drake v. Goodridge, 6 Blatchf. 151; Page v. Holmes B. A. Tel. Co., 18 Blatchf. 118.

[2] Fidelity Tr. & S. D. V. Co. v. Mobile S. Ry. Co., 53 Fed. R. 850.

[3] Forbes v. Memphis, El P. & P. R. Co., 2 Woods, 323. The right was denied where the petitioner acquired his claim pending the suit. Terry v. Bank of Cape Fear, 20 Fed. R. 777. *Cf.* Davis v. Sullivan, 33 N. J. Eq. 569.

[4] Ogilvie v. Knox Ins. Co., 2 Black, 539; s. c., 22 How. 380; Myers v. Fenn, 5 Wall. 205; Ex parte Jordan, 94 U. S. 248; First Nat. Ins. Co. v. Salisbury, 130 Mass. 303; Hallett v. Hallett, 2 Paige (N. Y.), 433; Leigh v. Thomas, 2 Ves. Sen. 312; Story's Eq. Pl., § 99.

[5] George v. St. Louis C. & W. Ry. Co., 44 Fed. R. 117.

[6] Central R. Co. v. Pettus, 113 U. S. 116; Trustees v. Greenough, 105 U. S. 527.

[7] Smith v. Kraft, 11 Biss. 340; Jones v. Davenport, 45 N. J. Eq. 77, 87. *Cf.* McDermott v. Strong, 4 J. Ch. (N. Y.) 687; Edmiston v. Lyde, 1 Paige (N. Y.), 639. But see Wilder v. Keeler, 3 Paige (N. Y.), 164; Strike's Case, 1 Bland (Md.), 57.

brought on behalf of a class will be joined as plaintiff. If he is a citizen of the same State as one of the defendants, that will not in most, if in any, cases deprive the court of jurisdiction.[8] If there should be any danger that it would, he may be joined as a defendant.[9] If he intends to act in hostility to the original complainant, the court may, in its discretion, add him to the defendants.[10]

In suits brought by or against a trustee, or otherwise affecting trust property, the beneficiaries of the trust, such as holders of bonds secured by a railroad mortgage, may be allowed to intervene for the purpose of protecting their interests;[11] but ordinarily the right to intervene will be denied them in the absence of fraud, neglect, inability, collusion or bad faith by the trustee.[12] Where a trustee represents bondholders under different mortgages with conflicting interests; or where, if a corporation, one of its officers or directors or controlling stockholders or counsel is a member of a reorganization committee which intends to buy the mortgaged property or is interested in a large claim against it, the trustee is under such disability to exercise unbiased judgment that an intervention should always be allowed.[13] When there is a substantial dispute between the bondholders as to the policy to be pursued, it is also proper to allow the intervention of committees representing

[8] Stewart v. Dunham, 115 U. S. 61. But see Mangels v. Donau Br. Co., 53 Fed. R. 513.

[9] Brown v. Pac. M. S. S. Co., 5 Blatchf. 525, 535.

[10] Galveston R. Co. v. Cowdrey, 11 Wall. 459, 478; Forbes v. Memphis, El P. & P. R. Co., 2 Woods, 323.

[11] Williams v. Morgan, 111 U. S. 684; Drew v. Harman, 5 Price, 319; Saylors v. Saylors, 3 Heisk. (Tenn.) 525; Birdsong v. Birdsong, 2 Head (Tenn.), 289; Carter v. New Orleans, 19 Fed. R. 659; Farmers' L. & Tr. Co. v. Mo. L. & N. Ry. Co., 21 Fed. R. 264; Farmers' L. & Tr. Co. v. No. Pac. R. Co., 66 Fed. R. 169.

[12] Richards v. Chesapeake & O. R. Co., 1 Hughes, 28, 36; Skiddy v. Atlantic, M. & O. R. Co., 3 Hughes, 320, 350–352, per Bond, J., Hughes, J., dissenting; Farmers' L. & Tr. Co. v. Kansas City, W. & N. W. R. Co., 58 Fed. R. 182; Clyde v. Richmond & D. R. Co., 55 Fed. R. 445. See *supra*, § 171.

[13] Farmers' L. & Tr. Co. v. Nor. Pac. R. Co., 66 Fed. R. 169; Farmers' L. & Tr. Co. v. Cape Fear & Y. V. Ry. Co., 71 Fed. R. 38; Grand Tr. Ry. Co. v. Central Vt. Ry. Co., 88 Fed. R. 622; Fowler v. Jarvis-Conklin M. Tr. Co., 64 Fed. R. 279; Hamlin v. Toledo, St. L. & K. C. R. Co., 78 Fed. R. 664, 672. But see Clyde v. Richmond & D. R. Co., 55 Fed. R. 445. A provision in the mortgage, that no holder can sue to foreclose until after a refusal by the trustee, does not preclude the intervention of a bondholder. Farmers' L. & Tr. Co. v. Nor. Pac. R. Co., 66 Fed. R. 169.

them.[14] In general, injustice is more apt to result from the denial, than from the grant, of a prayer for intervention in a railroad foreclosure suit.

In suits brought by or against a corporation, stockholders may be allowed to intervene if there is any danger of their being injured by fraud, neglect or collusion on the part of the officers;[15] and in some such cases stockholders have been allowed to file an answer and defend the suit in the name of the corporation.[16] In the absence of fraud, neglect, or collusion by the officers of the corporation, stockholders will not ordinarily be allowed to intervene before a decree;[17] unless a receiver has been appointed, when each separate group of stockholders with conflicting interests or taking opposite positions may be allowed an intervention.[18] A stockholder who prays leave to intervene and defend on behalf of his corporation should show a previous request to the board of directors and their refusal to defend, or else circumstances which would make such a request a vain form;[19] but if a petition defective in this respect shows a good defense, the proceedings should be stayed until an opportunity has been afforded for the petitioner to apply to the board of directors and then file a new petition.[20] Laches may be a reason for denying a stockholder's, bondholder's or creditor's petition of intervention when equities on the part of the complainant or other parties interested have arisen during the delay.[21]

[14] Farmers' L. & Tr. Co. v. Cape Fear & Y. V. Ry. Co., 71 Fed. R. 38; Toler v. East Tenn., V. & G. Ry. Co., 67 Fed. R. 168.

[15] Bayliss v. Lafayette, M. & B. Ry. Co., 8 Biss. 193.

[16] Bronson v. La Crosse & M. R. Co., 2 Wall. 283; Guarantee Tr. & S. Co. v. Duluth & W. R. Co., 70 Fed. R. 803; Ex parte Jordan, 94 U. S. 248, 249; Bayliss v. Lafayette, M. & B. Ry. Co., 8 Biss. 193. *Contra*, Ex parte Printup, 87 Ala. 148; Stretch v. Stretch, 2 Tenn. Ch. 140. In Central Tr. Co. v. Marietta & N. G. R. Co., 48 Fed. R. 14, the facts were held not to justify the intervention; but this case might very properly not be followed. See also Blackman v. Central R. & B. Co., 58 Ga. 189.

[17] Forbes v. Memphis, El. P. & P. R. Co., 2 Woods, 323, 333. For a peculiar case, see Coffin v. Chattanooga W. & P. Co., 44 Fed. R. 535.

[18] Fowler v. Jarvis-Conklin M. Tr. Co., 64 Fed. R. 279; Hamlin v. Toledo, St. L. & K. C. R. Co., 78 Fed. R. 664, 672. See Toledo, St. L. & K. C. R. Co. v. Continental Tr. Co., 95 Fed. R. 497, 535.

[19] Farmers' L. & Tr. Co. v. Toledo, A. A. & N. M. Ry. Co., 67 Fed. R. 49; General El. Co. v. West Asheville Imp. Co., 73 Fed. R. 386; *supra*, §§ 12, 76.

[20] Farmers' L. & Tr. Co. v. Toledo, A. A. & N. M. Ry. Co., 67 Fed. R. 49, 53.

[21] Boston S. D. & Tr. Co. v. Am. R. Tel. Co., 67 Fed. R. 165; Continental Tr. Co. v. Toledo, St. L. & K. C. R.

In general, a creditor who has no judgment cannot intervene to defend the suit;[22] nor can any intervenor set up a defense which was not open to the original defendant.[23] But where the corporation and the mortgage bondholders have arranged for a sale to a purchaser who agreed to give the stockholders an interest in the property without extending that privilege to unsecured creditors, the creditors who have no judgments may be allowed to intervene and set the sale aside.[24] Under a general creditor's bill, any creditor who intervenes may attack the claim of any other creditor,[25] except, perhaps, the complainant;[26] and when the creditor's suit has been consolidated with a subsequent foreclosure suit, he can attack the mortgage or the right of any bondholders to share in the proceeds of the sale.[27] A State cannot intervene in a foreclosure suit affecting property upon which it claims no lien, in order to enjoin the proceedings upon the ground that the plaintiff is forbidden by a State statute from acting as trustee for the mortgage bondholders.[28] But the State was allowed to intervene in a foreclosure suit to enforce its rights under a contract to which it was not a party.[29]

Co., 82 Fed. R. 642. But see Farmers' L. & Tr. Co. v. Toledo, A. A. & N. Ry. Co., 67 Fed. R. 49, 53, where relief was granted after an order taking the decree as confessed by the corporation; and Guarantee Tr. & S. D. Co. v. Duluth & W. R. Co., 70 Fed. R. 803, where relief was granted after the decree had been signed but not entered. *Cf. infra*, § 201*a*, n. 2.

[22] Lombard Inv. Co. v. Seaboard Mfg. Co., 74 Fed. R. 325; Farmers' L. & Tr. Co. v. Chicago & N. P. Ry. Co., 68 Fed. R. 412. See George v. St. Louis, C. & M. Ry. Co., 44 Fed. R. 117.

[23] Powell v. Leicester Mills, 92 Fed. R. 115. Such as a defense which the mortgagor is estopped from setting up. Farmers' L. & Tr. Co. v. Chicago & N. P. R. Co., 68 Fed. R. 412. But see Hollins v. Brierfield C. & I. Co., 150 U. S. 371, 379. That the corporation mortgagor has no legal existence. Continental Tr. Co. v. Toledo, St. L. & K. C. R. Co., 82 Fed. R. 642. That the court has no jurisdiction when that defense has been waived by the defendant. Central Tr. Co. v. McGeorge, 151 U. S. 129.

[24] Louisville T. Co. v. Louisville, N. A. & C. Ry. Co., 174 U. S. 674.

[25] Continental Tr. Co. v. Toledo, St. L. & K. C. R. Co., 82 Fed. R. 642, 647; Shewen v. Vanderhorst, 1 Russ. & M. 347; Owens v. Dickerson, Craig & P. 48, 56; Woodgate v. Field, 2 Hare, 211, 213; Graves v. Wright, 2 Dru. & War. 77, 79.

[26] Continental Tr. Co. v. Toledo, St. L. & K. C. R. Co., 82 Fed. R. 642, 647; Fuller v. Redman, 26 Beav. 614; Briggs v. Wilson, 5 De Gex, M. & G. 12.

[27] Continental Tr. Co. v. Toledo, St. L. & K. C. Ry. Co., 82 Fed. R. 642, 647.

[28] Farmers' L. & Tr. Co. v. Chicago & N. P. R. Co., 68 Fed. R. 412, 417.

[29] Tennessee v. Quintard, 80 Fed. R. 829.

New parties can always intervene by consent of the original parties.[30] Persons interested in disputing the validity of the patent have been allowed to intervene to defend a suit brought against their bailee, to enjoin the use by it of cars belonging to them;[31] and to move to set aside a decree establishing the validity of a patent entered by collusion, in a suit to which they were strangers.[32] But such persons were not allowed to intervene in a suit to restrain the infringement of a patent when they relied upon a distinct defense not raised therein.[33] Nor in any case where they were not employers of the person sued, nor in direct privity with him.[34]

In a suit to cancel a deed, it was held to have been erroneous to refuse one of the representatives of the grantors the right to intervene as a party plaintiff.[35] A person claiming a right to property held by a marshal[36] or receiver,[37] or claiming a right to share in a fund in court,[38] is usually allowed to intervene *pro interesse suo*, provided that he does not resist the prayer of the complainant.[39] A telegraph company claiming the right to use

[30] Galveston R. Co. v. Cowdrey, 11 Wall. 459, 464; French v. Gapen, 105 U. S. 509, 525.

[31] Standard Oil Co. v. Southern Pac. R. Co., 54 Fed. R. 521.

[32] Barker v. Todd, 15 Fed. R. 265. But see Washburn & Moen Mfg. Co. v. Colwell S. B. F. Co., 1 Fed. R. 225; Cochrane v. Deener, 95 U. S. 355.

[33] Page v. Holmes B. A. Tel. Co., 18 Blatch. 118; s. c., 2 Fed. R. 330; Cochrane v. Deener, 95 U. S. 355; Thomson-Houston El. Co. v. Sperry El. Co., 46 Fed. R. 75.

[34] Thomson-Houston El. Co. v. Sperry El. Co., 46 Fed. R. 75. In Ring R. & I. M. Co. v. St. Louis Ice Mfg. Co., 67 Fed. R. 535, a manufacturing company, which had stopped using the invention, was not allowed to intervene in a suit against one of its former customers. In Curran v. St. Charles Car Co., 32 Fed. R. 835, a vendor was allowed to intervene to defend an infringement bill against one of its vendees.

[35] Billings v. Aspen M. & S. Co. (C. C. A.), 51 Fed. R. 338.

[36] Gumbel v. Pitkin, 124 U. S. 131; *supra*, § 9. But where land had been sold by the marshal, a stranger claiming to be its owner was not allowed to intervene to set aside the sale. Ex parte Mensing, 55 Fed. R. 17.

[37] Lord Pelham v. Duchess of Newcastle, 3 Swanst. 290; Minot v. Mastin (C. C. A.), 95 Fed. R. 734; Mercantile Tr. Co. v. Atlantic & P. R. Co., 63 Fed. R. 513, 517; Daniell's Ch. Pr. (2d Am. ed.) 1270; *infra*, § 242. In the Second Circuit, interventions by creditors are not encouraged after the appointment of a receiver. Sands v. E. S. Greeley & Co., 80 Fed. R. 195.

[38] Central Tr. Co. v. Marietta & N. G. R. Co., 63 Fed. R. 492; Rice v. Durham Water Co., 91 Fed. R. 433. But see as to non-residents, Sands v. E. S. Greeley & Co. (C. C. A.), 80 Fed. R. 195.

[39] Continental Tr. Co. v. Toledo, St. L. & K. C. R. Co., 82 Fed. R. 642; Es-

the railroad's right of way was allowed to intervene in a foreclosure suit.[40] A party claiming the equitable title to land held by a railway company of which the receiver had not taken possession, and which was exempted from the receivership by order, and not otherwise mentioned in the proceedings, was denied leave to intervene in a suit to foreclose a mortgage on the property of the railroad.[41] The Attorney-General of the United States may intervene for the protection of the Federal government in a suit between two States affecting their boundaries.[42] The United States[43] or a State[44] may usually intervene in a suit affecting property in which the government claims an interest. A district attorney of the United States was refused permission to intervene in a suit by a person charged with a crime to obtain possession of certain papers, where the papers were needed as evidence before a grand jury.[45] A State statute authorizing or forbidding interventions in suits of equity will not be followed by a Federal court.[46]

terbrook Co. v. Ahern, 31 N. J. Eq. 3; *supra*, note 10.

[40] Mercantile Tr. Co. v. Atlantic & P. R. Co., 63 Fed. R. 513; Union Tr. Co. v. Atchison, T. & S. F. R. Co. (N. M.), 43 Pac. R. 701.

[41] Cutting v. Florida Ry. & Nav. Co., 45 Fed. R. 444.

[42] Florida v. Georgia, 17 How. 478; *supra*, § 14.

[43] Stanley v. Schwalby, 147 U. S. 508, 518.

[44] Tennessee v. Quintard, 80 Fed. R. 828; Tindal v. Wesley, 167 U. S. 204; *supra*, § 37.

[45] Potter v. Beal (C. C. A.), 50 Fed. R. 860.

[46] Mercantile Tr. Co. v. Atlantic & P. R. Co., 63 Fed. R. 513, 517.

In an instructive essay, Mr. Edward C. Eliot, of St. Louis, classifies cases of intervention as follows (31 Am. Law Rev. 377, 381, 382, 383, 385, 387, 390, 391, 392):

"The interventions of strangers to the original cause which will be entertained and adjudicated by the Federal courts may have as the basis of their institution one of the following matters of interest:

"1. They may be based upon a right or title to the subject-matter paramount in quality to the claims of the original parties to the suit and extending to the whole matter of rightful ownership. Into this class of intervention will fall almost all those proceedings which are permitted by the Federal courts as incidental to suits at law; and they are closely analogous to the ordinary interpleas permitted by statute and in the State courts. . . .

"2. In the second class of interventions may be placed those which are based upon some statutory or contractual lien which the intervenor has by law, independent of the peculiar jurisdiction of the Federal court, and which he seeks to impose upon the property in the charge of the court and to enforce in the Federal court because of his inability to pursue the same right or remedy in the State courts. Into this class of interventions fall the enforcement of

§ 201a. Practice upon interventions.— A petition of intervention may be filed at any stage of the cause, even after a final decree, provided, at least, that it is filed at the same

statutory or mechanics' liens, charges or liens which may be the result of private contract between the parties, and also judgment liens of later or earlier date obtained in the State courts, and which by State statute are made precedent in right to the complainant's cause of action. . . .

"3. The third class of interventions consists of those which are based, not upon rights or titles in the subject-matter existing in full force by law, irrespective of the action of the Federal tribunal, but such as rest upon equities which are purely the creation of the Federal courts and which in the judgment of such courts justify the preference of the intervenors, owing to such equities, over the rights of the parties to the suit. It is believed that the interventions which are now referred to are peculiar to railroad foreclosures. . . .

"4. The fourth class includes those interventions which rest upon legal rights or equitable liens upon the subject-matter in the hands of the court, but which are deferred in law or equity to the rights of the complainant. They may be superior to the rights of other parties to the suit. Manifestly these interventions, though they may be adjudicated, have no effect to postpone or interfere with the original purpose of the suit. They apply simply to any possible surplus which may be in the hands of the officers of the court after the objects of the original suit have been effected. They are then classified among themselves, but are made liens or charges only upon the remnant of the property which may be in the hands of the court.

"5. In the fifth class are interventions based upon contractual obligations which may be made or incurred by the receiver or other officer of the court in charge of the property during the litigation. . . .

"6. The last class of interventions includes those based upon the torts of the receiver in the management of property in the control of the court. . . .

"Owing to the lack of understanding of the real nature of intervening petitions and the fundamental ground upon which the court acts, attempts are often made to extend the jurisdiction of the Federal court upon petitions of this character to matters or for results which the court ought not to consider or to effect. In a railroad foreclosure suit, a deficiency decree against the defendant corporation for the amount of indebtedness not satisfied out of the proceeds of sale is proper, because such is the original cause of action of the complainant. But effort is sometimes made by individual bondholders, through interventions, to enforce some statutory or common-law liability upon the stockholders of the defendant corporation. While there may be no direct adjudication to that effect reported, it is evident that this would be an extension of the jurisdiction of the Federal court beyond reason. There may be, of course, causes in which the entire assets of a corporation are taken in charge by the court, as upon creditor's bill, where the individual liability of the stockholders of the corporation may be an asset in the hands of the receiver or other officer of the court. In that event, at the suggestion or motion of a creditor, no doubt the object of the principal cause would justify the enforcement of the liability. But it will be seen that

term.[1] The petition may, however, be denied for laches.[2] Where the original complainant had no interest in the relief prayed in a petition of intervention, it was held to be demurrable because of his joinder as a co-petitioner with the person interested.[3] A petition for leave to intervene should describe the proceedings in the cause in which it is filed, so that the court can see the nature and condition of the suit.[4] It may also contain a statement of the petitioner's view of the case, and pray in addition to intervention the final relief which he desires. While a petition of intervention need not be as formal as a bill of complaint, and should perhaps be distinguished for brevity, it yet should exhibit all the material facts which are relied upon for the specific relief asked, embodying, either by

this is really the purpose and object of the principal suit. The matter does not arise collaterally. And the personal liability is one of the property interests seized. So, in other cases, attempts have been made through interventions to try titles or rights which have been derived through the receiver, or by operation of the decrees or judgment of the court. These, also, are not properly subjects of interventions, although the courts have indeed held that a bill or motion may be entertained as ancillary to a decree or judgment, for the interpretation of that judgment or decree at the instance of a person who claims title under it. This is another case of the extreme limit of the principle. Interventions are also attempted and sometimes entertained to force upon the receiver a duty to make some equitable contract in favor of a public interest. Where such an intervention is to be considered, it ought to rest upon the propriety of the court's advising the receiver, and the proceeding should be considered as in the nature of a petition by him for advice. There has been, however, an instance where the intervening petition of a stranger to a suit was entertained to force the receiver to make a contract for the electric lighting, public and private, of a city, which was dependent upon the operation of the property in the hands of the receiver for that purpose. And, in that case, the judge of the United States court said that he would consider the application out of public necessity and because he would not permit his receiver to leave the city in darkness for want of a proper contract." Hodgen v. Met. El. Ry. Co., U. S. C. C. W. D. Mo., per Philips, D. J., May, 1894.

§ 201a. [1] New York G. & I. Co. v. Tacoma Ry. & M. Co. (C. C. A.), 83 Fed. R. 365; *supra*, § 200.

[2] Continental Tr. Co. v. Toledo, St. L. & K. C. R. Co., 82 Fed. R. 642; Boston S. D. & Tr. Co. v. Am. Rapid Tel. Co., 67 Fed. R. 165. A delay of about three years and a half in presenting a claim for payment in a foreclosure suit was held not to be laches, where the intervenor had in the meantime obtained a judgment against the defendant. New York G. & I. Co. v. Tacoma R. & M. Co. (C. C. A.), 83 Fed. R. 365. *Cf. supra*, § 201, note 21.

[3] Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 46 Fed. R. 156.

[4] Ransom v. Davis' Adm'rs, 18 How. 295.

recital or by reference, so much of the record of the original suit in which the petition is filed as is essential to show a right to the particular relief demanded by the petitioner.[5] Where, subsequently to the filing of the petition of intervention, proceedings have been had under the original bill which would fortify the right of the intervening petitioner, either to the particular relief demanded or to some other relief, the matter should be incorporated into the petition of intervention by amendment.[6] A petition seeking the payment by a receiver of a claim must specifically allege that he has sufficient funds which are properly applicable to the claim.[7] A petition to intervene and defend a suit should be accompanied by the answer proposed,[8] or, at least, should show the nature of the defense.[9]

All the parties to the suit are presumed to be parties to the petition of intervention, and, it has been held, are presumed to take notice of the same when it is filed, although it is the safer practice to serve them.[10] Notice of an application for intervention may, by leave of the court, be served on the attorneys for the other parties to the suit, who are beyond the jurisdiction of the court, unless the petition sets up new facts not set out in the bill nor germane to the case thereby made, which are made the basis of a prayer for independent affirmative relief, when it has been held that such substituted service cannot be permitted.[11] New parties brought in by the intervenors should be served with a subpœna or some other notice in the same manner as if the petition were an original bill.[12]

[5] French v. Gapen, 105 U. S. 509, 519, 520.

[6] Jenkins, J., in Empire Dis. Co. v. McNulta (C. C. A.), 77 Fed. R. 700, 703.

[7] Ibid. For allegations in an intervening petition, claiming preference for a judgment for death by negligence on the ground that the road was operated by a company acting as the agent of the bondholders, which were held to be too vague and indefinite to sustain a preference, see Veatch v. Am. L. & Tr. Co. (C. C. A.), 79 Fed. R. 471.

[8] Toler v. East Tenn., V. & G. Ry. Co., 67 Fed. R. 168.

[9] Grand Trunk Ry. Co. v. Central Vt. R. Co., 91 Fed. R. 569.

[10] Central Tr. Co. v. Madden (C. C. A.), 70 Fed. R. 451; McLeod v. City of New Albany, 66 Fed. R. 378; Lombard Inv. Co. v. Seaboard Mfg. Co., 74 Fed. R. 325.

[11] Fidelity Tr. & S. V. Co. v. Mobile St. Ry. Co., 55 Fed. R. 850. See *supra*, §§ 96, 172.

[12] Hook v. Mercantile Tr. Co., 95 Fed. R. 41, 47.

The proceedings in the suit may be stayed pending the hearing upon a petition of intervention, although such relief is extraordinary.[13]

If any of the original parties wishes to contest the petitioner's right to intervene, he must do so specifically at the hearing upon the petition.[14] He may file a demurrer, plea or answer to the petition.[15] But the usual practice is to present the objections informally by affidavit or otherwise upon the hearing.[16] It was held that the objection, that the intervenor's claim was barred by his failure to present the same within the time limited by a previous order in the cause, should be raised by plea and not by demurrer.[17] The filing of a replication to a petition of intervention and the proceeding to a hearing were held to be a waiver of objections to the sufficiency of the petition and to the absence of an order granting leave to intervene.[18] At the hearing upon a petition of intervention, it is customary for the court to determine the right of the petitioner to intervene; and then, if it decides in his favor in that respect, to refer the case to a master to report upon his right to the other relief which he seeks. But the court may decide the whole case without a reference.[19] And it is the rule in the Eighth circuit, that where the petition sets up a cause of action maintainable at common law the issue shall be tried by a jury.[20] It has been said that a denial of a petition for leave to intervene in an action at law is *res adjudicata* against a bill in equity to enjoin the proceedings and to permit an intervention;[21] but that a denial of leave to intervene in a suit in equity is not *res adjudicata* against an original bill for the same relief.[22] Leave to intervene when granted should

[13] Pennsylvania Co. v. Jacksonville, T. & K. Ry. Co., 55 Fed. R. 181.

[14] French v. Gapen, 105 U. S. 509, 525; Meyers v. Fenn, 5 Wall. 205.

[15] Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 46 Fed. R. 156.

[16] Interventions in the Federal Courts, by Edward C. Eliot, 31 Am. Law Rev. 377.

[17] Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 46 Fed. R. 156.

[18] Perry v. Godbe, 82 Fed. R. 141.

[19] Central Tr. Co. v. Madden, 70 Fed. R. 450.

[20] Rouse v. Hornsby (C. C. A.), 67 Fed. R. 219. So held in Atkyn v. Wabash Ry. Co., 41 Fed. R. 193, N. D. Ohio.

[21] McDonald v. Seligman, 81 Fed. R. 753.

[22] Credits Commutation Co. v. U. S., 177 U. S. 311. See Manhattan Tr. Co. v. Sioux City & N. R. Co., 102 Fed. R. 710.

be given by order;[23] but, by proceeding without objection, an omission to enter such an order will be waived.[24]

The filing of a petition of intervention is a voluntary general appearance in the suit, and the petitioner is thereby estopped from claiming that the court has no jurisdiction over him for any purpose or cause which, by proper amendment of the pleadings, can be brought into it.[25] After intervention the new parties are treated to all intents and purposes as if they had been original parties to the suit.[26] But a party who intervenes as an aditional plaintiff cannot make any separate motion in the cause except by special permission of the court, the original complainant remaining *dominus litis*.[27] The citizenship of the intervenors, if the suit is pending in a Federal court at the time of their intervention, does not affect the jurisdiction.[28] But the court will not decide an independent controversy between an intervenor and an original defendant of which it would have no jurisdiction upon an original bill, unless it relates to property in the court's possession.[29] Where the original suit appeared to have been brought by collusion, jurisdiction was retained over intervening petitioners who asserted claims to property held by a receiver therein appointed.[30] Where, at the time of the intervention, the suit is pending in a State court, the intervenors may in a proper case remove it.[31] They have the right to appeal from the final decree, and can

[23] For the form of an order see Ex parte Jordan, 94 U. S. 248, 249.

[24] Myers v. Fenn, 5 Wall. 205; French v. Gapen, 105 U. S. 509, 525; Ferry v. Godbe, 82 Fed. R. 141.

[25] Bowdoin College v. Merritt, 59 Fed. R. 6; Jack v. D. M. & Ft. D. R. Co., 49 Iowa, 627; *supra*, §§ 100, 101.

[26] French v. Gapen, 105 U. S. 509, 525.

[27] Manning v. Mercantile Tr. Co., 26 Misc. (N. Y.) 440.

[28] Krippendorf v. Hyde, 110 U. S. 276, 283, 284; Park v. N. Y., L. E. & W. R. Co., 70 Fed. R. 641.

[29] United El. S. Co. v. Louisville El. L. Co., 68 Fed. R. 673; Clyde v. Richmond & D. R. Co., 65 Fed. R. 336. See Olds Wagon Works v. Benedict (C. C. A.), 67 Fed. R. 1. Where an intervening petition was filed in a foreclosure suit, asserting a lien superior to that of the mortgage, and the intervenor was found to have no lien; it was held not error to dismiss the petition without awarding him a money judgment. U. S. Tr. Co. v. Western Contract Co. (C. C. A.), 81 Fed. R. 454.

[30] El. Supply Co. v. Port Bay W. L. & Ry. Co., 84 Fed. R. 740.

[31] Hack v. Chicago & G. S. Ry. Co., 23 Fed. R. 356; Jackson & Sharp Co. v. Pearson, 60 Fed. R. 118, 123; *infra*, § 384. But see Iowa Homestead Co. v. Des Moines Nav. & R. Co., 8 Fed. R. 97.

then object to all interlocutory proceedings taken after their intervention.[32] It has been held that, where the issues have been decided by a jury trial, the review should be by writ of error.[33] The final order or decree upon a petition of intervention after the intervention has been granted may be reviewed apart from the appeal from the final decree in the whole cause where it is distinct from the same;[34] but where the case is one in which the Circuit Court of Appeals has final jurisdiction of an appeal from the decree in the original cause, its decree upon an appeal from the final decree or order upon the intervenor's claim is likewise final, even though a Federal question is involved therein.[35] Where a denial of the right to intervene would be a practical denial of all the relief to the petitioner, perhaps an appeal will lie from an order denying an intervention.[36] For example, where there is a fund in court in the course of administration which will be distributed to others unless the intervenor's claim is forthwith determined.[37] But otherwise an order denying leave to intervene is not appealable.[38] A paper styled a cross-bill,[39] or which purports to be an original bill,[40] if otherwise correct in form, may be sustained as a petition of intervention. A paper improperly styled a petition of intervention may, if it contains the necessary allegations, be sustained as a cross-bill.[41] Where relief was granted upon a petition for intervention, which regularly should have been sought by an original bill, since all the par-

[32] Ex parte Jordan, 94 U. S. 248, 252; Williams v. Morgan, 111 U. S. 684.

[33] Rouse v. Hornsby, 67 Fed. R. 219.

[34] Central Tr. Co. v. Grant Locomotive Works, 135 U. S. 207; Pennsylvania R. Co. v. Wabash, St. L. & P. Ry. Co., 155 U. S. 225; Rouse v. Hornsby, 67 Fed. R. 219; Hanrick v. Patrick, 119 U. S. 156.

[35] Rouse v. Letcher, 156 U. S. 47; Gregory v. Van Ee, 160 U. S. 643; Rouse v. Hornsby, 161 U. S. 588.

[36] Credits Commutation Co. v. U. S., 91 Fed. R. 570, 573; s. c., 177 U. S. 311.

[37] Ibid.

[38] Ex parte Cutting, 94 U. S. 14; Jones & Laughlin's L'd v. Sands, 79 Fed. R. 913; Credits Commutation Co. v. U. S., 91 Fed. R. 570, 573; s. c., 177 U. S. 311; Toledo, St. L. & K. C. R. Co. v. Continental Tr. Co., 95 Fed. R. 497, 536. But see Louisville Tr. Co. v. Louisville, N. A. & C. Ry. Co., 174 U. S. 674; Hamlin v. Toledo, St. L. & K. C. R. Co., 78 Fed. R. 664. It has been held that the proper practice is for the Circuit Court to grant an appeal in every case, leaving the question of the appealability of the order for the decision of the court of review. U. S. v. Phillips (C. C. A.), 107 Fed. R. 824.

[39] French v. Gapen, 105 U. S. 509, 519; Gregory v. Pike, 67 Fed. R. 837.

[40] Minot v. Mastin, 95 Fed. R. 734.

[41] Central Tr. Co. of N. Y. v. Marietta & N. Ry. Co., 68 Fed. R. 492.

ties interested had been brought before the court and had had a hearing, the decree was affirmed.[42]

§ 202. Form of petitions and practice upon them.—A petition should be properly entitled in the cause in which it is presented.[1] When not a cause petition, a petition is entitled "In the matter of the application of," etc. The petitioner, if not a party to a cause in which the petition is filed, should state his name, residence, and description.[2] A petition should contain no scandal or impertinence; for which, like any other proceeding, it may be referred.[3] A petition need not be signed by counsel unless it seeks a rehearing on appeal.[4] Petitions are usually signed by the party making them, either personally or by his solicitor.[5]

"Petitions are either for orders of course, or for special orders. Petitions for orders of course are forthwith granted, without any attendance being ordered; if they are for special matters a day is appointed for hearing them. Most things which may be moved for of course, may also be obtained as of course, upon petition."[6] All petitions which are for matters not granted as of course must be served upon all parties interested in the matter prayed for in them. Service is made substantially in the same way and at the same time before the hearing as that of notices of motions.[7] If actual, and not constructive, service is required, it seems that it must be made by delivering a copy of the petition, and at the same time showing the original to the person served,[8] unless the court otherwise directs.

Objections to the form of a petition can only be taken by demurrer.[9] By answering a respondent loses his right to demur,[10] and, it has been held, waives the objections that the petitioner had a complete and adequate remedy at law,[11] that he should have proceeded by bill instead of by petition;[12] and, if a receiver, that he has not obtained leave to sue.[13] Adverse

[42] Central of Georgia Ry. Co. v. Paul, 93 Fed. R. 878.

§ 202. [1] Daniell's Ch. Pr. (2d Am. ed.) 1802.

[2] Glazbrook v. Gillatt, 9 Beav. 492.

[3] Daniell's Ch. Pr. (2d Am. ed.) 1803.

[4] Daniell's Ch. Pr. (2d Am. ed.) 1803.

[5] Daniell's Ch. Pr. (2d Am. ed.) 1803.

[6] Daniell's Ch. Pr. (2d Am. ed.) 1802.

[7] See Rules 5 and 6; Daniell's Ch. Pr. (2d Am. ed.) 1804.

[8] Daniell's Ch. Pr. (2d Am. ed.) 1804.

[9] U. S. R. S., § 954; Newman v. Moody, 19 Fed. R. 858.

[10] Newman v. Moody, 19 Fed. R. 858.

[11] Newman v. Moody, 19 Fed. R. 858.

[12] Newman v. Moody, 19 Fed. R. 858.

[13] Newman v. Moody, 19 Fed. R. 858.

parties may file answers denying the facts stated in a petition, or setting up other facts in avoidance. Such answers should be verified by affidavit.[14] If the parties are at issue as to the facts, according to the more formal practice testimony may be taken as in the regular course of a suit;[15] but the more usual course is for the parties on either side to support their claim by affidavits, in the same manner as when supporting or opposing a motion.[16] Proceedings upon the hearing of petitions are similar to those upon the hearing of motions.[17] It has been said by Daniell that a petition cannot be amended by adding to it a statement of facts which have occurred since it was filed;[18] but an English judge has held otherwise.[19]

§ 203. Orders.—An order is a direction of the court or a judge thereof in writing.[1] A telegram may be an order, but a message by telephone is not.[2] When contained in a decree, an order is termed a decretal order. Orders may be made at any place within the territorial jurisdiction of the court;[3] and in a Circuit Court, if all judges authorized to sit therein are absent from the circuit, it seem that they may be made by a justice of the Supreme Court sitting anywhere within the United States.[4] It has been held, that when a district judge has, under the order of the circuit judge, tried a case in another district than his own, he may hear in his own district a motion for a new trial when the counsel for all parties waive his return to the district of the trial for the purpose of hearing and deciding the motion.[5] It is usual, though not indispensable, in the Federal courts, before the entry of an order or decree upon the decision of the court after argument, to serve upon the attorney for the opposite party a copy of the paper proposed to be

[14] Mitford's & Tyler's Pl. 448.

[15] Mitford's & Tyler's Pl. 448.

[16] Daniell's Ch. Pr. (5th Am. ed.) 1608.

[17] Daniell's Ch. Pr. (2d Am. ed.) 1805.

[18] Daniell's Ch. Pr. (5th Am. ed.) 1610.

[19] Malins, V. C., In re Westbrook's Trusts, L. R. 11 Eq. 252.

§ 203. [1] See U. S. R. S., § 719; Goodyear D. V. Co. v. Folsom, 3 Fed. R. 509. The practice of entitling the same order in several cases was criticised in August v. Fourth Nat. Bank, 9 N. Y. Supp. 270. The recital in an order that it was granted "upon all the papers and proceedings" was said to be too indefinite. Faxon v. Mason, 87 Hun (N. Y.), 139.

[2] Schofield v. Horse S. C. Co., 65 Fed. R. 433, 435.

[3] In re Tampa S. R. Co., 168 U. S. 583, 588.

[4] U. S. v. Louisville & P. C. Co., 4 Dill. 601; Searles v. Jacksonville, P. & M. R. Co., 2 Woods, 621; U. S. R. S., § 719; 8 Ry. & Corp. L. J. 200.

[5] Cheesman v. Hart, 42 Fed. R. 98, 105.

entered, with a notice that it will be presented for settlement at a specified time and place.[6] If the attorneys live in the same town as the judge, one day's notice of settlement is usually sufficient. Orders upon interlocutory applications should be served upon the solicitor of the opposite party. If the other party takes a step in the action after an *ex parte* order has been obtained but before its service, "that step being in itself regular, the order which had been obtained and not served cannot afterwards be acted upon, if it will interfere with the step so taken."[7] If it is intended to enforce the order by contempt proceedings, it should be served personally upon the party to be affected by it,[8] unless possibly, in an extraordinary case, an order should be granted allowing substituted service.[9]

Interlocutory orders made upon motion may be altered or vacated at any time;[10] and orders made *ex parte* upon petition may also be discharged upon motion for irregularity.[11] According to the English practice, orders made after a hearing upon a petition could not be altered or discharged without the filing of a petition for a rehearing, or upon appeal.[12] A court has, during the term at which it is entered, the power to review and modify or set aside any order or decree, interlocutory or final.[13] It has been held to be improper to file a bill of review or supplemental bill in the nature of the same in order to set aside an interlocutory order or decree.[14] It has been held that an order in an action at common law staying plaintiff's proceedings till he pays costs of a former action is *res adjudicata* upon a subsequent motion, and is in so far a final order that it cannot be modified or set aside at a subsequent term.[15] It has

[6] Nevada N. S. v. National N. Co., 103 Fed. R. 391, 394.

[7] Daniell's Ch. Pr. (2d Am. ed.) 1789; Church v. Marsh, 2 Hare, 652.

[8] Re Cary, 10 Fed. R. 622.

[9] Hunter v. ——, 6 Sim. 429; Lorton v. Seaman, 9 Paige (N. Y.), 609; People v. Brower, 4 Paige (N. Y.), 405; Stafford v. Brown, 4 Paige (N. Y.), 360.

[10] Daniell's Ch. Pr. (2d Am. ed.) 1616, 1807; Eslava v. Mazange, 1 Woods, 623, 627; Nelson v. Barker, 3 McLean, 379.

[11] In re Marrow, Craig & Ph. 142; Daniell's Ch. Pr. (2d Am. ed.) 1807.

[12] Bishop v. Willis, 2 Ves. Sen. 113; In re Marrow, Craig & Ph. 142; Daniell's Ch. Pr. (2d Am. ed.) 1808. But see In re Dovenby Hospital, 1 Myl. & Cr. 279; West v. Smith, 3 Beav. 306.

[13] Doss v. Tyack, 14 How. 297, 313; Basset v. U. S., 9 Wall. 38, 41; Henderson v. Carbondale C. & C. Co., 140 U. S. 25, 40. See *infra*, § 350.

[14] Buckles v. Chicago, M. & St. P. Ry. Co., 53 Fed. R. 566.

[15] C. & A. Potts Co. v. Creager, 71 Fed. R. 74.

been held that, even in a criminal case, the court, at a term after final judgment, may enter an order correcting a clerical error *nunc pro tunc* as of the preceding term.[16] An order granted after a hearing before one judge of a court will, unless under extraordinary circumstances, not be modified or vacated by another except upon appeal.[17] Unless limited by their terms, or, as in the case of injunctions granted by district judges, by statute,[18] orders within the jurisdiction of the judge or court that grants them remain in force until discharged by a subsequent order;[19] or until the final decree, when, unless renewed by its terms, all orders expire.[20] Before the Evarts Act, no appeal lay before the final decree from an interlocutory order which was not final in its nature.[21] It has been said by Chief Justice Taney, that "In this respect the practice of the United States chancery courts differs from the English practice. For appeals to the House of Lords may be taken from an interlocutory order of the chancellor, which decides a right of property in dispute; and therefore there is no irreparable injury to the party by ordering his deed to be canceled, or the property he holds to be delivered up, because he may immediately appeal, and the execution of the order is suspended until the decision of the appellate court. But the case is otherwise in the courts of the United States, where the right to appeal is by law limited to final decrees. And if by an interlocutory order or decree he is required to deliver up property which he claims, or to pay money which he denies to be due, and the order is immediately carried into execution by the Circuit Court, his right of appeal is of very little value to him, and he may be ruined before he is permitted to avail himself of the right. It is exceedingly important, therefore, that the Circuit Courts of the United States, in framing their interlocutory orders, and in carrying them into execution, should

[16] In re Wight, 134 U. S. 136. Regularly the date of an order should be the day when it was pronounced, not the day of its entry. Ex parte Hookey, 4 De G., F. & J. 456; Ex parte Whitton, 13 Ch. D. 881.

[17] Cole S. M. Co. v. Virginia & G. H. W. Co., 1 Saw. 685, 689; Oglesby v. Attrill, 14 Fed. R. 214.

[18] U. S. R. S., § 719; Gray v. Chicago, I. & N. R. Co., 1 Woolw. 63; *infra*, § 230.

[19] Eslava v. Mazange, 1 Woods, 623, 627.

[20] Gardner v. Gardner, 87 N. Y. 14; Daniell's Ch. Pr. (2d Am. ed.) 1902.

[21] See *infra*, chapters on Writs of Errors and Appeals.

keep in view the difference between the right of appeal, as practiced in the English chancery jurisdiction, and as restricted by the act of Congress, and abstain from changing unnecessarily the possession of property, or compelling the payment of money by an interlocutory order."[22] An appeal lies to the Circuit Court of Appeals from an interlocutory order or decree granting or continuing an injunction or appointing a receiver.[23]

§ 204. Judges who may grant orders.— An order may be made by any judge authorized to sit in the court in which the cause is pending. In the Supreme Court it is the custom for each justice to refer to the full bench every application of importance which is made to him.[1] An order in a case pending in a Circuit Court may be made by the justice of the Supreme Court allotted to that circuit;[2] or by any justice of the Supreme Court requested, in writing, by the circuit justice to hold court in his circuit;[3] or if there is no justice of the Supreme Court allotted to that circuit, by any justice of the Supreme Court requested by the Chief Justice to hold court there;[4] by the circuit judge of that circuit;[5] by the district judge of that district;[6] or by any judge authorized to hold the District Court in that district;[7] or by any two of those judges.[8]

An order in a case pending in a District Court may be made by the judge of that district; or, if such office is vacant, by the judge of any other district within the same State;[9] in case of the disability of the district judge for that district, or such an accumulation or urgency of business as to make the public interest require his appointment, by any other district judge within the same circuit designated and appointed after a certificate, under the court's seal, by the clerk as to those facts, by the circuit justice or circuit judge of the circuit, or, if both of them are absent from the circuit and unable to make such designation and appointment, by the Chief Justice of the United States;[10] in the District Court for the Northern District of New

[22] Forgay v. Conrad, 6 How. 201, 205.

[23] Act of June 16, 1900, 31 St. at L. 660; *infra*, § 238.

§ 204. [1] Spies v. Illinois, 123 U. S. 131.

[2] U. S. R. S., §§ 605, 606, 609.

[3] U. S. R. S., § 617. See Supervisors v. Rogers, 7 Wall. 175.

[4] U. S. R. S., § 618.

[5] U. S. R. S., § 609.

[6] U. S. R. S., § 609.

[7] U. S. R. S., §§ 591–603.

[8] U. S. R. S., § 609.

[9] U. S. R. S. 603; Am. L. & T. Co. v. East & West R. Co., 40 Fed. R. 182.

[10] U. S. R. S., §§ 591–596. The appointment should be filed in the

York, when the judge thereof is disabled and so notifies the judge of the Southern District of New York, by the latter judge;[11] in the District Court for the Southern District of New York, when the judge thereof is disabled and so notifies the judge of the Eastern District, by the latter judge;[12] in the same court, by the judge of the Eastern District of New York, whenever the judge of the Southern District deems it desirable on account of the pressure of public business that the former shall perform judicial duties in his district, and has entered an order to that effect;[13] in one of the District Courts of Florida, by the judge of the other district, in a place where a term of such court is regularly held, when the judge of the district has filed in the clerk's office a certificate stating that he is disabled to hold a term of court there, and requesting the judge of the other district to hold the same.[14] An order made by the district judge of another district in the same State who was not sitting nor designated to sit in the district where the suit was pending, the office of district judge of the latter district not being vacant, was held null and void.[15] An order signed by a judge after his successor has been appointed and he has received notice thereof is void.[16]

clerk's office of the District, not of the Circuit Court, but a failure to file the same does not invalidate the judge's acts. National H. for D. V. S. v. Butler, 88 Fed. R. 874.

[11] U. S. R. S., § 599.

[12] U. S. R. S., § 599.

[13] U. S. R. S., § 600.

[14] U. S. R. S., § 598.

[15] Am. L. & T. Co. v. East & West R. Co., 40 Fed. R. 182.

[16] U. S. v. Alexander, 46 Fed. R. 728; Norton v. Shelby Co., 118 U. S. 425. But see Manning v. Weeks, 139 U. S. 504; Ball v. U. S., 140 U. S. 118.

CHAPTER XVI.

INJUNCTIONS.

§ 205. Definition, classification, and objects of injunctions.— An injunction is a writ issued from a court of equity commanding a person to do an act or acts other than the payment to the complainant of a sum of money, or not to do an act or acts specified therein. According to the different aspects from which they are considered, injunctions are classified as judicial writs, and writs remedial; as mandatory and prohibitory; as provisional and perpetual; or as common and special. Before describing the different characteristics of each of these classes, it may be well to refer briefly to the different occasions for the issue of the writ. Injunctions may be obtained to enforce a trust or other purely equitable right, to compel obedience to a covenant or other contract affecting land, to compel the obedience of corporations to their charters, to prevent a multiplicity of suits, generally to prevent an irreparable injury for which damages at law would be no adequate remedy, and also in cases in which they are expressly authorized by statute.

§ 206. Injunctions to enforce trusts and other purely equitable rights.— As trusts and other purely equitable rights are not recognized in courts of law, equity will always interfere to protect them by injunction when they are threatened with infringement.[1] On this account an injunction may be obtained to prevent the revelation or use of a secret of manufacture by a workman who has learned it under an express or implied promise of secrecy, or one to whom such a person has disclosed it;[2] and to restrain the publication of lectures,[3] man-

§ 206. [1] Scott v. Becher, 4 Price, 346; In re Chertsy Market, 6 Price, 261; Sloo v. Law, 3 Blatchf. 459; Draper v. Davis, 104 U. S. 847; Cowles v. Whitman, 10 Conn. 121; Bispham's Eq., § 425; Kerr on Injunctions, 172, 173.

[2] Yovatt v. Winyard, 1 Jac. & Walk. 394; Morison v. Moat, 9 Hare, 241; Peabody v. Norfolk, 98 Mass. 452. But see Newbery v. James, 2 Meriv. 446.

[3] Abernethy v. Hutchinson, 3 L. J. Ch. 209.

uscripts[4] or works of art[5] heard or obtained under an express or implied agreement not to publish or reproduce them. Whether or not the publication of private letters which have no value as literary productions can be restrained at the prayer of their writer, upon the ground that it would be a breach of an implied trust, is, under the authorities, an open question.[6]

§ 207. Injunctions to restrain corporations from violating their charters.— The charters of corporations are considered "in the light of contracts made by the legislature on behalf of every person interested in anything to be done under them."[1] On account of the irreparable injury that would otherwise ensue, and in the case of corporations to whom the State's right of eminent domain is delegated, because they are trustees,[2] the disobedience of a corporation to its charter may be restrained by injunction, at the suit either of the attorney-general[3] of the State to which it owes its existence, or of any individual who suffers special injury thereby.[4] This rule applies whether the act complained of has been forbidden expressly, or merely by implication as not included within the powers expressly given to the corporation and those which are necessary for their proper exercise.[5] "It is," said Lord Hatherley, "a principle of public policy that where Parliament has authorized a company to raise a large capital for a specified purpose, the privilege confers no right upon the company to employ their capital in competition with the general public upon speculations of a different character."[6] "It is because these companies, being

[4] Stapleton v. Foreign V. Ass'n, 12 W. R. 976; Scheile v. Brakell, 11 W. R. 796. See, however, Southey v. Sherwood, 2 Meriv. 435.

[5] Prince Albert v. Strange, 1 Macn. & G. 25, 42.

[6] Woolsey v. Judd, 4 Duer (N. Y.), 379, and Eyre v. Higbee, 35 Barb. (N. Y.) 502, hold that they can, and Judge Story concurs in this view. Folsom v. Marsh, 2 Story, 100, 109, 110; Story's Eq. Jur., §§ 946-948. But the opposite view is maintained in Gee v. Pritchard, 2 Swanst. 402; Wetmore v. Scovell, 3 Edw. Ch. (N. Y.) 515; Hoyt v. Mackenzie, 3 Barb. Ch. (N. Y.) 320; Brandreth v. Lance, 8 Paige (N. Y.), 24, 28.

§ 207. [1] Blakemore v. Glamorganshire Canal Nav., 1 Myl. & K. 154, 162.

[2] M'Coy v. Chicago, L, St. L. & C. R. Co., 13 Fed. R. 8.

[3] Atty. Gen. v. Great N. Ry. Co., 1 Dr. & Sm. 154; Atty. Gen. v. Railroad Cos., 35 Wis. 425. But see Atty. Gen. v. Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371.

[4] Bostock v. North Staffordshire Ry. Co., 3 Sm. & Giff. 283; Colman v. Eastern Counties Ry. Co., 10 Beav. 1.

[5] Atty. Gen. v. Great N. Ry. Co., 1 Dr. & Sm. 154.

[6] Cited in Kerr on Injunctions, p. 473.

armed with the power of raising large sums of money, if they were allowed to apply their funds to purposes other than those for which they were constituted, might acquire such a preponderating influence and command over some particular branch of trade or commerce, as would enable them to drive the ordinary private trader from the field, and create in their own favor a practical monopoly, whereby the interests of the public would be most seriously injured."[7] When the corporation violates its charter by refusing to perform an act thereby expressly or impliedly commanded, it has been held that the attorney-general cannot compel its obedience by a mandatory injunction, but should in such a case apply for a mandamus.[8] A private individual suing to enjoin a corporation from violating its charter must show some special damage caused to himself by the breach.[9] A shareholder in a company is considered to incur special damage by its diverting its funds to other purposes than its charter authorizes, and can obtain an injunction to restrain it from so doing,[10] even, it has been held, if he bought shares in the company for the very object of preventing it;[11] provided that he sues in good faith, and does not act as the mere puppet of a rival corporation;[12] and that the suit is not brought "against the corporation and other parties, founded on rights which may properly be asserted by the corporation."[13] The holder of a lien to secure an indebtedness of a corporation is also, it seems, entitled to an injunction in a similar case.[14] An unsecured creditor cannot bring such a suit,[15]

[7] Atty. Gen. v. Great N. Ry. Co., 1 Dr. & Sm. 154, 159, 160.

[8] Atty. Gen. v. B. & O. J. Ry. Co., 15 Jur. 1024; People v. Albany & Vt. R. Co., 24 N. Y. 261.

[9] Chamberlaine v. Chester & B. Ry. Co., 1 Exch. 869, 877; Railroad Co. v. Ellerman, 105 U. S. 166, 173, 174.

[10] Colman v. Eastern Counties Ry. Co., 10 Beav. 1.

[11] Colman v. Eastern Counties Ry. Co., 10 Beav. 1; Atty. Gen. v. Great N. Ry. Co., 1 Dr. & Sm. 154; Bloxam v. Met. Ry. Co., L. R. 3 Ch. 337.

[12] Forrest v. Manchester, S. & L. Ry. Co., 4 De G., F. & J. 126; Filder v. London, B. & S. C. Ry. Co., 1 H. & M. 489; Robson v. Dodds, L. R. 8 Eq. 301; Rogers v. Oxford, W. & W. Ry. Co., 2 De G. & J. 662.

[13] Rule 94; Hawes v. Oakland, 104 U. S. 450. See *supra*, §§ 12, 76, 87.

[14] Bagshaw v. Eastern U. Ry. Co., 2 Macn. & G. 389; Herrick v. Grand T. Ry. Co., 7 Up. Can. L. J. 240. And it has been held that such a bondholder need not show that the corporation is not in collusion with him. Mercantile T. Co. v. Texas & P. Ry. Co., 51 Fed. R. 529, 536.

[15] Syers v. Brighton B. Co., 11 L. T. (N. S.) 560; Mills v. Northern Ry. of Buenos Ayres Co., 23 L. T. (N. S.) 719.

except under very extraordinary circumstances.[16] One whose land has been taken from him for the use of a corporation by the exercise of the State's right of eminent domain can obtain an injunction to restrain the use of the land for any other purpose than is allowed by the company's charter,[17] provided at least that he can show that he is thereby injured.[18] It is, however, no proper ground for complaint by an individual that a corporation by exercising powers not conferred upon it by its charter enters into competition with him, and thereby diminishes the profits of his trade or calling.[19] An English judge has said: "Where a statute prohibits the doing of a particular act affecting the public, no person has a right of action against another merely because he has done the prohibited act. It is incumbent on the party complaining to allege and prove, that the doing of the act prohibited has caused him some special damage, some peculiar injury, beyond that which he may be supposed to sustain in common with the rest of the Queen's subjects, by an infringement of the law. But where the act prohibited is obviously prohibited for the protection of a particular party, there it is not necessary to allege special damage."[20]

§ 208. Injunctions to enforce the specific performance of covenants and other contracts affecting land.— As no two pieces of land are exactly alike, equity considers that in no case can damages in money be adequate compensation for the breach of a covenant or other contract affecting land.[1] Accordingly, the specific performance of contracts for the purchase or sale of land and of covenants affecting the same, will be specifically enforced with the aid of an injunction, whenever they are mutual,[2] certain,[3] not unconscionable,[4] and their

[16] Evans v. Coventry, 5 De G., M. & G. 911.

[17] Bostock v. North S. Ry. Co., 8 Sm. & Giff. 288.

[18] East & W. India Docks & B. J. Ry. Co. v. Dawes, 11 Hare, 368; Lee v. Milner, 2 Y. & C. 611; Ware v. Regents Canal Co., 3 De G. & J. 212.

[19] Railroad Co. v. Ellerman, 105 U. S. 166, 173, 174.

[20] Pollock, C. B., in Chamberlaine v. Chester & B. Ry. Co., 1 Exchequer, 869, 877. See Blakemore v. Glamorganshire Canal Nav., 1 Mylne & Keen, 154, 162.

§ 208. [1] Adderley v. Dixon, 1 Sim. & Stu. 607; Bispham's Eq., § 375.

[2] Dorsey v. Packwood, 12 How. 126; Bispham's Eq., § 377.

[3] Colson v. Thompson, 3 Wheat. 336; Bispham's Eq., § 377.

[4] Surget v. Byers, Hempst. 715; Roundtree v. McLain, Hempst. 245; Miss. & Mo. R. Co. v. Cromwell, 91

enforcement would be practicable.[5] The rule concerning the enforcement of covenants affecting land has been thus stated: "If the construction of the instrument be clear and the breach clear, then it is not a question of damage, but the mere circumstance of the breach of covenant affords sufficient ground for the court to interfere by injunction."[6] This is, however, subject to the exception that if it would be against public policy to enforce the covenant,— for example, if a change of circumstances have rendered it improper to use land in accordance with the terms of a covenant regulating its use,— or if, on account of such a change, the object of the parties to the covenant would not be accomplished by its enforcement, equity will not interfere.[7]

§ 209. Injunctions to restrain a multiplicity of suits.— Injunctions are granted in order to prevent a multiplicity of suits under bills of peace. Bills of peace are bills to restrain a number of persons from endeavoring to enforce in different suits the same or similar claims;[1] or to prevent a single person from reiterating in several successive suits the same unsuccessful claim;[2] or to prevent a person from levying a tax, the payment of which will subject the plaintiff to the hazard of a number of suits from other parties;[3] bills of interpleader[4] and in the nature of interpleader;[5] bills to enjoin a continuing tres-

U. S. 643; Bispham's Eq., § 376. See Randolph's Ex'r v. Quidnick Co., 135 U. S. 457.

[5] Ross v. Union Pac. R. Co., 1 Woolw. 26; Fallon v. Railroad Co., 1 Dill. 121; Texas & Pac. Ry. Co. v. Marshall, 136 U. S. 393; Bispham's Eq., § 377.

[6] V. C. Wood in Tipping v. Eckersley, 2 K. & J. 264. See also Lord Manners v. Johnson, L. R. 1 Ch. D. 673; Lloyd v. London, C. & D. Ry. Co., 2 De G., J. & S. 568; T. of Columbia College v. Lynch, 70 N. Y. 404.

[7] Duke of Bedford v. British Museum, 2 M. & K. 552; Troy & B. R. Co. v. Boston, H. T. & W. Ry. Co., 86 N. Y. 107; Columbia College v. Thacher, 87 N. Y. 311; Leake's Digest of the Law of Contracts, 1152. But see Lloyd v. London, Ch. & D. Ry. Co., 11 Jur. (N. S.) 380.

§ 209. [1] Sheffield Water Works v. Yeomans, L. R. 2 Ch. App. 8. See Scottish Union, etc. Ins. Co. v. J. H. Mohlmann & Co. 73 Fed. R. 66; *supra*, §§ 72, 73.

[2] Earl of Bath v. Sherwin, 4 Brown Parliamentary Cases, 373.

[3] Cummings v. National Bank, 101 U. S. 153, 157; Pelton v. National Bank, 101 U. S. 143, 148; Hills v. Exchange Bank, 105 U. S. 319; *supra*, § 12.

[4] Louisiana State Lottery Co. v. Clark, 16 Fed. R. 20; s. c., 4 Woods, 169; McLaughlin v. Swann, 18 How. 217; City Bank v. Skelton, 2 Blatchf. 14; *supra*, § 88.

[5] Dorn v. Fox, 61 N. Y. 264; *supra*, § 89.

pass,[6] nuisance,[7] infringement of patents,[8] copyrights[9] and trade-marks;[10] and bills to quiet possession.[11] Injunctions to restrain a continuing trespass, nuisance and the infringement of patents, copyrights and trade-marks, are more often said to be granted to prevent irreparable injury, and will, therefore, be considered under that head. An injunction to quiet the possession before the hearing formerly issued to restrain the party to whom it was directed from taking forcible possession of lands pending litigation concerning them. It was issued at the request of either a plaintiff or a defendant to a suit, if the applicant had had peaceable possession of the premises for the three years preceding the filing of the bill, and his interest therein had not been determined by forfeiture, surrender, or other lawful means. He was required to swear to these facts in his bill, and according to the practice before Lord Bacon's time, to give a bond to the amount of £10 as a security that the information so given was true.[12] Such injunctions were formerly very common; but have now fallen into disuse. The last reported instance was in Lord Hardwicke's time.[13]

§ 210. Injunctions to prevent irreparable injury for which the remedy at law is inadequate; in general.— The most ordinary ground upon which an injunction issues, and the one, indeed, which includes all but the first of those previously mentioned, is that, otherwise, the plaintiff would suffer an irreparable injury, for which damages at law would be no adequate remedy. It would be impossible specifically to mention here all the different instances in which an injunction issues for this reason; but the following is an enumeration of those of more frequent occurrence which have not been previously described. An injunction will issue on account of the inadequacy of the remedy at common law: to stay proceedings in other courts, either of law, equity, or admiralty;[1] to restrain the indorse-

[6] Northern Pac. R. Co. v. Burlington & Missouri R. Co., 2 McCrary, 203; *infra*, § 215.

[7] Woodruff v. North Bloomfield G. M. Co., 18 Fed. R. 753. See § 214.

[8] U. S. R. S., § 4921; *supra*, § 216.

[9] U. S. R. S., § 4970; *supra*, § 77; *infra*, § 217.

[10] Shaw Stocking Co. v. Mack, 12 Fed. R. 707; *supra*, § 218.

[11] Hughes v. Morden College, 1 Ves. Sen. 188. See *supra*, § 7.

[12] Eden on Injunctions, ch. xvi, p. 240.

[13] Hughes v. Morden College, 1 Ves. Sen. 188.

§ 210. [1] § 211.

ment or negotiation of notes and bills of exchange, the sale of land, the sailing of a ship, the transfer of stock, or the alienation of a specific chattel;[2] to restrain the commission of every species of waste or act in the nature of waste;[3] to suppress the continuance of a public or private nuisance;[4] to prevent a threatened destructive trespass;[5] to prevent the infringement of patents;[6] to prevent the violation of copyright, whether by printed publications, or theatrical representation, or otherwise;[7] to prevent the unauthorized use of trade-marks,[8] and the opening of private letters;[9] to compel the performance or prevent the breach of contracts other than those for the payment of money only;[10] and, under very extraordinary circumstances, to compel the delivery of personal property wrongfully withheld.[11] An injunction has been granted to restrain the sale by scalpers of return railroad tickets, which by their terms were not transferable, when the use of such tickets could only be made by fraud;[12] and to prevent the creation of a cloud on a title.[13]

§ 211. Injunctions to stay proceedings in other courts.— Injunctions to stay proceedings in other courts are of much less frequent occurrence now that discovery and the inspection of documents can be obtained at common law without the aid of equity than they were formerly; but they are still occasionally issued, especially in bankruptcy.[1] Such injunctions must not be confounded with writs of prohibition, which are addressed to the judges of a court, whereas injunctions are directed to the parties to the proceedings which it is desired to restrain.[2] Ordinarily, when two courts have a concurrent jurisdiction over the same thing, whichever court was first possessed of the cause has a right to proceed with the same, and proceedings in it will not be prohibited or restrained in another.[3] A State court

[2] § 212.
[3] § 213.
[4] § 214.
[5] § 215.
[6] § 216.
[7] § 217.
[8] § 218.
[9] § 219.
[10] § 220.
[11] § 221.
[12] Nashville, C. & St. L. Ry. Co. v. McConnell, 82 Fed. R. 65.
[13] Wilson v. Lambert, 168 U. S. 611.

§ 211. [1] McLean v. Lafayette Bank, 3 McLean, 185; In re Schwartz, 14 Fed. R. 787.
[2] See Eden on Injunctions, ch. ii; Peck v. Jenness, 7 How. 624; Dillon v. K. C. S. R. Ry. Co., 43 Fed. R. 109, 111.
[3] Nicholas v. Nicholas, Prec. in Ch. 546; Daniell's Ch. Pr. (2d Am. ed.) 1845; *supra*, §§ 9, 10. But see Erie Ry. Co. v. Ramsey, 45 N. Y. 637.

has no power to stay by injunction a proceeding in a court of the United States.[4] The Constitution does not forbid a State court from enjoining in a proper case a person within its jurisdiction from prosecuting a suit in a court of another State.[5] The Revised Statutes of the United States expressly provide that "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."[6] "This prohibition of the statute extends to all cases over which the State court first obtains jurisdiction, and applies not only to injunctions aimed at the State court itself, but also to injunctions aimed to parties before the court, its officers or litigants therein.[7] Accordingly a Federal court has refused to enjoin a railway company from taking possession of land upon the termination of condemnation proceedings in a State court,[8] and a town from selling property to pay an assessment the collection of which has been ordered by a State court directing the laying out of a highway;[9] and a State receiver from issuing receiver's certificates;[10] and parties to a suit in a State court from carrying out an agreement sanctioned by it;[11] and an administrator from distributing the estate in his hands.[12]

The statute does not forbid an injunction against the commencement of a civil suit not already brought.[13] It has been

[4] McKim v. Voorhies, 7 Cranch, 279; Duncan v. Darst, 1 How. 301–306; City Bank of N. Y. v. Skelton, 2 Blatchf. 14.

[5] Cole v. Cunningham, 133 U. S. 107.

[6] U. S. R. S., § 720. See Slaughter House Cases, 10 Wall. 273; Haines v. Carpenter, 91 U. S. 254; Dial v. Reynolds, 96 U. S. 340; Rensselaer & S. R. Co. v. Bennington & R. R. Co., 18 Fed. R. 617; M., K. & T. Ry. Co. v. Scott, 13 Fed. R. 793; s. c., 4 Woods, 386; Hamilton v. Walsh, 23 Fed. R. 420; Tifft v. Iron Clad Mfg. Co., 16 Blatchf. 48; Yick Wo v. Crowley, 26 Fed. R. 207. Where a bill prays an injunction or stay proceedings in a State court, and also other relief which would be useless without such an injunction, the whole bill will be dismissed on demurrer. Molony v. Massachusetts Loan Ass'n, 53 Fed. R. 209.

[7] Toulmin, D. J., in Whitney v. Wilder (C. C. A.), 54 Fed. R. 554, 555; Chicago Trust & Sav. Bank v. Bentz (C. C. A.), 59 Fed. R. 645, 647.

[8] Dillon v. Kansas City S. B. Ry. Co., 43 Fed. R. 109.

[9] Fenwick Hall Co. v. Old Saybrook, 66 Fed. R. 389.

[10] Reinach v. Atlantic & G. W. R. Co., 58 Fed. R. 33.

[11] Ibid.

[12] Whitney v. Wilder (C. C. A.), 54 Fed. R. 554.

[13] Texas & P. Ry. Co. v. Kutemen (C. C. A.), 54 Fed. R. 547. For the con-

held that a Federal court has power to issue an injunction to stay proceedings in a State court which interfere with the enforcement of one of its own judgments, and to stay proceedings which have been instituted or continued after the beginning or removal of the suit in the Federal jurisdiction.[14] Such an injunction should rarely be issued.[15] It has been held that where property has been sold under a decree directing that the purchaser pay all claims against the receiver, the court will enjoin a suit against the purchaser[16] in the State court, but that this rule does not apply where property in the possession of a receiver is returned to the original owner on the same conditions;[17] that under the act of Congress limiting the liability of the owners of ships, a District Court of the United States may issue a stay-order restraining proceedings previously begun in State courts;[18] that when a creditor of a corporation has begun proceedings in a Federal court to enforce his claim against the corporation, the defendant corporation may be enjoined "from taking proceedings for its own dissolution, or for the appointment of a receiver of its effects, or for the distribution thereof among its stockholders and any other persons, and from making any distribution or transfer of any of its effects."[19] It has been said that "it is now so thoroughly

struction of an order forbidding the use of a certain defense, see Wakelee v. Davis, 50 Fed. R. 522.

[14] French v. Hay, 22 Wall. 250; Dietzsch v. Huidekoper, 103 U. S. 494; Fisk v. Union Pac. R. Co., 10 Blatchf. 518; Sharon v. Terry, 36 Fed. R. 337; Jesup v. Wabash, St. L. & P. Ry. Co., 44 Fed. R. 663, 664, 667; Abeel v. Culberson, 56 Fed. R. 329; Baltimore & O. R. Co. v. Ford, 85 Fed. R. 170; Bowdoin College v. Merritt, 59 Fed. R. 86; Central Trust Co. v. St. Louis, A. & T. Ry. Co., 59 Fed. R. 385; Central Tr. Co. v. Western N. C. R. Co., 89 Fed. R. 24; Garner v. Second Nat. Bank, 67 Fed. R. 833; Lanning v. Osborne, 79 Fed. R. 657; *supra*, § 9; *infra*, §§ 223, 251, 391. But an injunction was refused where, although a petition for removal with a bond had been filed in the State court, no action had been taken upon them and no copy of the record had been filed in the Federal court. Coeur d'Alene Ry. & Nav. Co. v. Spalding (C. C. A.), 93 Fed. R. 280. See Missouri, K. & T. Ry. Co. v. Scott, 13 Fed. R. 793.

[15] Frishman v. Insurance Co., 41 Fed. R. 449; Sinclair v. Pierce, 50 Fed. R. 851; *infra*, § 391.

[16] Jesup v. Wabash, St. L. & P. Ry. Co., 44 Fed. R. 663, 664, 667; Central Tr. Co. v. St. Louis, A. & T. Ry. Co., 59 Fed. R. 385.

[17] Texas & Pac. Ry. Co. v. Johnson, 151 U. S. 81.

[18] In re Long Island, N. S. P. & F. T. Co., 5 Fed. R. 599. See Providence & N. Y. S. S. Co. v. Hill Mfg. Co., 109 U. S. 578, 600.

[19] Fisk v. Railroad Co., 10 Blatchf. 518. But see Kessler v. Continental C. & I. Co., 42 Fed. R. 258.

settled that this provision of law does not apply to proceedings incidental to jurisdiction properly acquired by a Federal court for other purposes than that of enjoining proceedings in a State court, that the proposition needs no discussion."[20] It has been held that a judge of a Circuit or District Court has no power to enjoin the enforcement of a judgment in a State court after an appeal to the Supreme Court of the United States and a *supersedeas;*[21] and that can only be done, if at all, by a justice of the Supreme Court.[22] Proceedings in a State court cannot be enjoined upon the sole ground that they are taken under a State statute which is repugnant to the Federal Constitution.[23] It has been held that a Federal court can prevent by injunction the levy of a State sheriff under State process against a State judgment-debtor upon the property of a stranger to the suit and process;[24] but not the sale by the sheriff of the property of sureties on a sale bond under the execution of a State court;[25] nor, it seems, enjoin the sale by the sheriff of property in his possession and in the custody of the State court;[26] that a Federal court may enjoin the use of a judgment of a State court when the validity of the judgment is not thereby impaired.[27]

An injunction granted by a State court to stay proceedings in the same or another tribunal of the State remains in force after a removal to a Federal court of the suit in which it was granted,[28] although such an injunction could not be originally issued in the Federal court in a suit removed from a State court.[29] It has been held that in the Federal courts an injunction cannot be granted to forbid the prosecution in a State

[20] Gregory v. Pike, 67 Fed. R. 835, 836, per Putnam, J.

[21] Murray v. Overstoltz, 8 Fed. R. 110.

[22] Ibid.

[23] Rensselaer & S. R. Co. v. B. & R. Co., 18 Fed. R. 617. See, however, U. S. R. S., § 1979; Tuchman v. Welch, 42 Fed. R. 548; reversed, s. c., 45 Fed. R. 288; criticised in 24 Am. L. Rev. 661.

[24] Cropper v. Coburn, 2 Curt. 465.

[25] Am. Ass'n Ld. v. Hurst, 59 Fed. R. 1.

[26] Southern Bank & Tr. Co. v. Folsom (C. C. A.), 75 Fed. R. 929; Watson v. Bondurant, 2 Woods, 166; Perry v. Sharpe, 8 Fed. R. 23; *supra*, § 9.

[27] Linton v. Mosgrove, 14 Fed. R. 543, criticised in Am. Ass'n Ld. v. Hurst, 59 Fed. R. 1, 4, but supported by Provident L. & Tr. Co. v. Mills, 91 Fed. R. 435.

[28] Smith v. Schwed, 6 Fed. R. 455; Perry v. Sharpe, 8 Fed. R. 15. But see Lawrence v. Morgan's R. R. & S. S. Co., 121 U. S. 634.

[29] Diggs v. Wolcott, 4 Cranch, 179.

court of criminal proceedings, whether then pending[30] or to be subsequently commenced;[31] nor against a removal from office, State[32] or Federal.[33] "This court," said Lord Hardwicke, speaking of the Court of Chancery, "has no jurisdiction to stay proceedings on a mandamus;[34] nor to an indictment; nor to an information; nor to a writ of prohibition, that I know of."[35] It has been doubted whether a Federal Circuit Court has the power to enjoin the prosecution of a suit in a Federal court in another circuit.[36] Such an injunction has been refused when sought by a defendant to a patent-suit for the purpose of enjoining the prosecution of suits previously brought upon the same patent.[37] The subsequent commencement of suits upon the same patent has been enjoined.[38] It has been held that, in a suit by the United States to vacate a patent for an invention, a preliminary injunction will not be granted to restrain the prosecution by the defendant of suits for the infringement of the patent.[39] Where a plaintiff is bringing suits upon the same patent against different defendants, who rely upon the same defenses, the court may stay proceedings in all but one till the validity of the patent has been finally determined in the excepted case.[40] But where some of the de-

[30] Fitts v. McGhee, 172 U. S. 516, 571; Harkrader v. Wadley, 172 U. S. 148, 169.

[31] Ibid.

[32] In re Sawyer, 124 U. S. 200.

[33] White v. Berry, 171 U. S. 366; White v. Butler, 171 U. S. 379.

[34] But it has been held that a Federal court may enjoin a State officer from an act, although an application is then pending for a mandamus to compel him to perform it, and it was said that the injunction would be a defense to the mandamus proceeding. Bank of Kentucky v. Stone, 88 Fed. R. 383, 398.

[35] Lord Montague v. Dudman, 2 Vesey Sr. 396, 398.

[36] Kelley v. Ypsilanti D. S. Mfg. Co., 44 Fed. R. 19, 20, per Brown, J.

[37] Kelley v. Ypsilanti D. S. Mfg. Co., 44 Fed. R. 19; Am. School F. Co. v. J. M. Sauder Co., 106 Fed. R. 731. But see Ide v. Ball Eng. Co., 31 Fed. R. 901.

[38] Birdsall v. Manufacturing Co., 1 Hughes, 64. But see Strait v. Nat. Harrow Co., 51 Fed. R. 819. A bill to enjoin defendant from prosecuting an action at law for an infringement cannot be sustained when the only grounds alleged are that complainant will be put to great expense for attorney's fees and other costs, and that he is informed that defendant will be unable to pay the same. Germain v. Wilgus (C. C. A.), 67 Fed. R. 597.

[39] U. S. v. Colgate, 21 Fed. R. 318.

[40] Birdsell v. Hagerstown Ag. I. Mfg. Co., 1 Hughes, 64; Rumford Chem. Works v. Hecker, 5 Off. Gaz. 644; Allis v. Stowell, 16 Fed. R. 783; Nat. Cash Reg. Co. v. Boston Cash I. & R. Co., 41 Fed. R. 51.

fendants set up different defenses, it was held that the court "could not restrain in part and permit in part the prosecution of the cases. It would have no right to issue an injunction which should [*sic*] have the effect to split up the cases, enjoining their prosecution as to some branches of the controversy and permitting it as to the others."[41] It was at first held that a court had no power to restrain a defendant from suing in a foreign court;[42] but it is now established that it can do so,[43] though such a power is exercised with great caution.[44] An injunction order providing "that all suits and proceedings on the part of" certain persons "against the said bankrupt, to collect the debt set forth, be, and the same are hereby stayed, to await the determination of the court in bankruptcy on the question of the discharge therein," was held violated by those who, after discontinuing a suit then pending, subsequently instituted another to recover the same claim, with new allegations charging fraud.[45]

§ 212. Injunctions to restrain the alienation of property. Injunctions may be obtained to prevent the alienation of property "where it would work irremediable or gross injustice."[1] An injunction will, therefore, issue to prevent the transfer of notes, bills of exchange, and other documents, whether negotiable or not, whose possession gives their holder a presumptive title to the rights which they evidence,[2] when obtained from the plaintiff by the defendant through duress, fraud, or other iniquity; or when forged;[3] or when, though the holder may have properly obtained them, he threatens or is about to use them in an inequitable manner.[4] An injunction may be granted to prevent a party from making vexatious alienations of land

[41] Dyer, J., in Allis v. Stowell, 16 Fed. R. 788, 790.

[42] Love v. Baker, 1 Ch. Cas. 67, decided by Lord Clarendon; but the reporter added, "*sed quære*, for all the bar was of another opinion."

[43] Bunbury v. Bunbury, 1 Beav. 318; Dehon v. Foster, 4 Allen (Mass.), 545; Engel v. Scheuerman, 40 Ga. 206; Massie v. Watts, 6 Cranch, 148; Cole v. Cunningham, 133 U. S. 107.

[44] Vail v. Knapp, 49 Barb. (N. Y.) 299; Story's Eq. Jur., §§ 899, 900.

[45] In the Matter of Schwarz, 14 Fed. R. 787.

§ 212. [1] Story's Eq. Jur., § 953.

[2] Osborn v. U. S. Bank, 9 Wheat. 738, 845; Lloyd v. Gurdon, 2 Swanst. 180; Hood v. Aston, 1 Russ. 412; Lord Chedworth v. Edwards, 7 Ves. 46; Reeve v. Perkins, 2 J. & W. 390; Schermerhorn v. L'Espenasse, 2 Dall. 360.

[3] Esdaile v. La Nauze, 1 Y. & C. 394.

[4] Anon., 6 Madd. 10.

pending a suit concerning the title to the same.[5] For it was said that, otherwise, the plaintiff might be put to the expense of making each vendee or grantor a party to the proceedings; and, at all events, his title, if he prevails in the suit, may be embarrassed by the new outstanding claims of title under the threatened transfer.[6] The sale or transfer,[7] or removal beyond the jurisdiction of the court,[8] of a chattel, the loss of which could not be compensated in damages, may also be thus restrained; and so has been the sale of other personal property.[9] Injunctions have also been granted at the suit of a part-owner to prevent the sailing of a ship until his share could be ascertained, and a bond given to secure him against loss upon the voyage;[10] to prevent the removal of timber wrongfully cut down;[11] and to prevent the trustees of a dissenting chapel from appointing as a minister a person not duly qualified according to its constitution.[12]

§ 213. Injunctions to prevent waste.— An injunction will issue to prevent waste, whether legal or purely equitable.[1] Waste is a permanent injury to real estate committed by a person in possession with a limited interest in the same. Legal waste consists of such acts as would be considered waste at common law; equitable waste, of such acts as at law would not, under the circumstances of the case, be considered waste, but which are so esteemed in the view of a court of equity, from their manifest injury to the inheritance, though not inconsistent with the legal rights of the party committing them.[2] Such is wilful and wanton injury to land committed by a tenant

[5] Daly v. Kelly, 4 Dow, 417; Echliff v. Baldwin, 16 Ves. 267. But see Turner v. Wight, 4 Beav. 40.

[6] Daniell's Ch. Pr. (2d Am. ed.) 1873.

[7] Gibson v. Lewis, 11 Phila. (Pa.) 476; Lady Arundell v. Phipps, 10 Ves. 139; Daniell's Ch. Pr. (2d Am. ed.) 1872.

[8] Green v. Hanberry, 2 Brock. 403; Haly v. Goodson, 2 Mer. 77; Christie v. Craig, 2 Mer. 137.

[9] Bateau v. Bernard, 3 Blatchf. 244; Higgins v. Jenks, 3 Ware, 17.

[10] Haly v. Goodson, 2 Mer. 77; Christie v. Craig, 2 Mer. 137. But see Wilkinson v. Dobbie, 12 Blatchf. 298.

[11] Bradley v. Reed, 2 Pittsb. (Pa.) 519; Anon., 1 Ves. Sr. 93; Daniell's Ch. Pr. (2d Am. ed.) 1874.

[12] Milligan v. Mitchell, 1 M. & K. 446.

§ 213. [1] Garth v. Cotton, 1 Dick. 183; Thruston v. Mustin, 3 Cranch, C. C. 335; U. S. v. Gear, 3 How. 120; Fletcher v. N. O. N. E. R. Co., 20 Fed. R. 845; Lanier v. Alison, 31 Fed. R. 100; Bispham's Eq., §§ 429–432.

[2] Daniell's Ch. Pr. (2d Am. ed.) 1854, 1855.

without impeachment for waste.[3] The interference of equity in cases of this kind is justified, not only by the fear of irremediable injury, but also because the tenant for life or years is considered to stand in a trust relation toward the remainderman. So anxious is equity to prevent waste, that it has sustained a bill praying such an injunction filed in behalf of a child in its mother's womb.[4] An injunction will be granted to restrain acts in the nature of waste committed by one in possession of land the title to which is in litigation.[5] It has been held that an applicant for the purchase of government land whose claim is disputed in the land office cannot obtain an injunction to prevent acts of waste by county officers.[6]

§ 214. Injunctions to prevent the continuance of a nuisance.—The interference of equity to enjoin the continuance of a nuisance is not only due to the fact that the acts complained of produce irreparable injury, but also is allowed to prevent the multiplicity of suits that would be necessary were the plaintiff confined to his remedy at common law.[1] Nuisances are of two kinds: those which are injurious to the public at large, and those which are injurious to the rights and interests of private persons.[2] The use of this remedy to suppress a public nuisance is of very ancient date.[3] It was applicable in England, both to nuisances strictly so called and to *purprestures*. "By *purpresture* is meant, in its present acceptation, an encroachment upon the Crown, either upon part of the demesne lands, or upon the high roads, rivers, ports, or streets; and the difference between *purprestures* and nuisances consists in this, that where the *jus privatum* of the Crown is invaded it is a *purpresture*, but where the *jus publicum* is violated it is a *nuisance*. In cases of purpresture the remedy is either by information for an intrusion at the common law, or by information in equity at the suit of the attorney-general. The consequence of a judgment at common

[3] Vane v. Lord Barnard, 2 Vern. 738; Garth v. Sir John Hind Cotton, 1 Dick. 183; s. c., 1 White & Tudor's Lead. Cas. in Eq. (6th ed.) 806; Bispham's Eq., § 434.

[4] Musgrave v. Parry, 2 Vern. 710; Lutterel's Case, cited Prec. Ch. 50; Scatterwood v. Edge, 1 Salk. 229.

[5] U. S. v. Parrott, 1 McAll. 271; Lanier v. Alison, 31 Fed. R. 100.

[6] McBride v. Pierce County, 44 Fed. R. 17.

§ 214. [1] Fishmongers' Co. v. East India Co., 1 Dick. 163; Atty. Gen. v. Nichol, 16 Ves. 338, 342.

[2] Daniell's Ch. Pr. (2d Am. ed.) 1657.

[3] Ibid.

law being the abatement of the erection or grievance complained of, whether it is or is not a nuisance, whilst upon an information in equity, where the trespass does not produce any public injury, the court may direct an inquiry whether it is most beneficial to the Crown to abate the purpresture, or to suffer the erection to remain and be assessed as a part of the legal revenue."[4] Cases of public nuisance may be enjoined at the suit of the attorney-general, who in England sues by information.[5] It has been held that the United States may sue to enjoin acts in pursuance of an unlawful conspiracy to forcibly obstruct interstate commerce and the transport of the mails;[6] and to enjoin a nuisance which threatens injury to works in aid of commerce constructed under the authority of the national government.[7] A public nuisance may also be restrained at the suit of any who have suffered by it special damage distinct from that which it causes to the public at large; but not otherwise.[8] A bill, for example, may be filed by a State to enjoin the erection of a bridge across a navigable stream which will injure her commerce;[9] but not by a city for a similar reason,[10] unless its property, for example, a wharf, is thereby injured.[11] A private nuisance is an act, or series of acts, unaccompanied by an act of trespass, which causes a substantial injury to a person's property, health, or comfort. It will always be restrained when it would otherwise cause an irreparable injury or a multiplicity of suits.[12] "It used to be thought, that if a man knew there was a nuisance, and went and lived

[4] Daniell's Ch. Pr. (2d Am. ed.) 1857, citing Atty. Gen. v. Richards, 2 Anst. 603; Atty. Gen. v. Johnson, 2 J. Wil. 87. See also U. S. v. Gear, 3 How. 120.

[5] Daniell's Ch. Pr. (2d Am. ed.) 1858.

[6] In re Debs, 158 U. S. 581; In re Lennon, 166 U. S. 548.

[7] U. S. v. Miss. & R. R. Boom Co., 3 Fed. R. 548; s. c., 1 McCrary, 601.

[8] Baines v. Baker, Amb. 158; Miss. & Mo. R. Co. v. Ward, 2 Black, 485; Georgetown v. Alexandria Canal Co., 12 Pet. 91; Irwin v. Dixion, 9 How. 10; Spooner v. McConnell, 1 McLean, 337; Works v. Junction R. Co., 5 McLean, 425.

[9] Pennsylvania v. W. & B. R. Co., 18 How. 518.

[10] Georgetown v. Alexandria Canal Co., 12 Pet. 91.

[11] St. Louis v. Knapp Co., 104 U. S. 658. A railroad company cannot have an injunction against the keeping of a saloon where its workmen buy liquors. Northern Pac. R. Co. v. Whalen, 149 U. S. 157.

[12] Osburne v. Barter & Goddins, anno 26 Eliz., Choyce Cas. in Ch. (ed. of 1870), p. 176; Parker v. Winnipiseogee Lake C. & W. Co., 2 Black, 545; Woodruff v. North Bloomfield G. M. Co., 18 Fed. R. 753; St. Helen's S. Co. v. Tipping, 11 H. L. C. 642.

near it, he could not recover, because, it was said, it is he that goes to the nuisance, and not the nuisance to him. This, however, is not the law now."[13] Formerly, an injunction was rarely issued to restrain a nuisance until the plaintiff's right of action had been established at law; "but now a suit at law is no longer a necessary preliminary, and the right to an injunction, in a proper case, in England and most of the States, is just as fixed and certain as the right to any other provisional remedy."[14] Formerly, it was a fundamental objection to an order for an injunction to restrain a nuisance to land when the legal title was disputed, that the order contained no provision for putting the question in a course of legal investigation.[15]

§ 215. Injunctions to restrain trespass.—Injunctions to restrain trespass are of comparatively recent origin. The first that is to be found in the books was granted by Lord Thurlow.[1] They are only granted when the trespass is destructive or continuous. The rule upon the subject has been thus stated by Vice-Chancellor Kindersley: "Where, therefore, the plaintiff is in possession and the person doing the acts complained of is an utter stranger, not claiming under color of right, the tendency of the court is not to grant an injunction, unless there are special circumstances, but to leave the plaintiff to his remedy at law; though, where the acts tend to the destruction of the estate, the court will grant it.[2] But where the party in possession seeks to restrain one who claims by adverse title, then the tendency will be to grant the injunction, at least where the acts done either did or might tend to the destruction of the estate."[3] The destruction of credit by an illegal seizure of

[13] Byles, J., in Hole v. Barlow, 4 C. B. (N. S.) 334. See St. Helen's S. Co. v. Tipping, 11 H. L. C. 642; Campbell v. Seaman, 63 N. Y. 568.

[14] Judge Earl in Campbell v. Seaman, 63 N. Y. 568, 582. See, however, Irwin v. Dixion, 9 How. 10; Murtagh v. Philadelphia, 1 Weekly Notes of Cases, 37. But see McBride v. Board of Com'rs of Pierce County, 44 Fed. R. 17.

[15] Harman v. Jones, Cr. & Ph. 299; Sanxter v. Foster, Cr. & Ph. 303.

§ 215. [1] Flamang's Case, cited by Lord Eldon in Hanson v. Gardiner, 7 Ves. 305. For injunctions against the collection of an illegal tax, see *supra*, § 12.

[2] See Jerome v. Ross, 7 J. Ch. (N. Y.) 315; Troy & B. R. Co. v. Boston, H. T. & W. Ry. Co., 86 N. Y. 107; Van Norden v. Morton, 99 U. S. 378; Erhart v. Boaro, 113 U. S. 537; St. Louis M. & M. Co. v. Montana M. Co., 58 Fed. R. 129.

[3] Lowndes v. Bettle, 33 L. J. Ch. 461.

one's stock in trade,[4] and the injury to a farm done by the illegal taking of all the stock and tools upon it, have been held instances of such irreparable injury.[5] An attempt by a railroad company to build its road upon private property without payment of compensation, may be thus prevented.[6] It is not certain, whether the fact that a person who threatens to commit a wrong is insolvent and unable to pay any damages which could be recovered at law, is in itself a sufficient ground for the interference of equity by injunction; but the weight of authority seems to hold that it is.[7] It was held, where there was a dispute as to the possession and as to right to the possession of a railroad track, that the court would not interfere by injunction to assist in "a scramble for possession."[8] A number of cases decided in the courts of different States hold that an injunction cannot be obtained to restrain an illegal arrest; since it is said that the writ of *habeas corpus* followed by an action for damages always affords an adequate remedy for any injury resulting therefrom;[9] but if the result of the arrests would be an irreparable injury to the business of the complainant, an injunction might perhaps be issued.[10]

[4] Watson v. Sutherland, 5 Wall. 74; Cropper v. Coburn, 2 Curt. 465; North v. Peters, 138 U. S. 271.

[5] Breeden v. Lee, 2 Hughes, 484.

[6] N. P. R. Co. v. Burlington & M. R. Co., 2 McCrary, 203; s. c., 4 Fed. R. 298. See also Mo., K. & T. Ry. Co. v. T. & St. L. Ry. Co., 10 Fed. R. 497. But see D. M. Osborne Co. v. Mo. Pac. R. Co., 147 U. S. 248; Burlington G. L. Co. v. Burlington, C. R. & N. Co., 165 U. S. 370.

[7] Connolly v. Belt, 5 Cranch C. C. 405; M'Elroy v. Kansas City, 21 Fed. R. 257, 262; Coeur d'Alene Cons. & Mining Co. v. Miners' Union of Wardner, 51 Fed. R. 260; Agar v. Regent's Canal Co., cited in 1 Swanst. 250; Musselman v. Marquis, 1 Bush (Ky.), 463; Hicks v. Compton, 18 Cal. 206; Britton v. Hill, 12 C. E. Green (N. J.), 389; Lloyd v. Heath, Busb. Eq. (N. C.) 89; Gause v. Perkins, 3 Jones' Eq. (N. C.) 177; Ches. & O. R. Co. v. Patton, 5 W. Va. 234; Bispham's Eq., § 436; Caro v. Met. El. Ry. Co., 46 N. Y. Super. Ct. 188. *Contra*, Heilman v. Union Canal Co., 87 Pa. St. 100; Thompson v. Williams, 1 Jones' Eq. (N. C.) 176; Nessle v. Reese, 19 Abb. Pr. (N. Y.) 240; High on Injunctions, § 18.

[8] St. Louis, K. C. & C. Ry. Co. v. Dewees, 23 Fed. R. 691. See Latham v. Northern Pac. R. Co., 45 Fed. R. 721.

[9] Cohen v. Com'rs of Goldsboro, 77 N. C. 2; Burnett v. Craig, 30 Ala. 135; Burch v. Cavanaugh, 12 Abb. Pr. (N. S.) (N. Y.) 410; Davis v. Am. Soc. for P. of C. to A., 6 Daly (N. Y.), 81; s. c. on appeal, 75 N. Y. 362. See also Yick Wo v. Crowley, 26 Fed. R. 207; Electric N. & M. T. Co., 75 Fed. R. 898.

[10] Louisiana S. L. Co. v. Fitzpatrick, 3 Woods, 222; Dinsmore v. New York B. of P., 12 Abb. N. Cas. (N. Y.) 436; Manhattan I. W. Co. v. French, 12 Abb. N. Cas. (N. Y.) 446.

During the last few years this branch of equitable jurisdiction has been widely extended by the issue of injunctions against striking laborers upon the complaint of their employers. Injunctions have been granted forbidding all of the strikers from acts of violence against their employer's property,[11] and acts of violence, or threats of violence, against persons employed to take their places;[12] and even to forbid gathering or marching in procession upon the highway near their employer's premises,[13] and picketing the works by stationing men outside to request travelers on the highway not to buy of their employer and not to enter his service.[14] A few of the judges have gone so far as to enjoin striking[15] and boycotting;[16] but the principal injunction against striking was reversed upon ap-

[11] Consol. S. & W. Co. v. Murray, 80 Fed. R. 811.

[12] Consol. S. & W. Co. v. Murray, 80 Fed. R. 811; Hamilton-Brown Shoe Co. v. Saxey, 131 Mo. 212; s. c., 32 S. W. R. 1106; Am. S. & W. Co. v. Wire Drawers' & D. M. Unions, 90 Fed. R. 608; Springfield S. Co. v. Riley, L. R. 6 Eq. 551. But see Richter v. Journeymen T. Union, 24 Ohio L. Bull. 189.

[13] Mackall v. Ratchford, 82 Fed. R. 41; Consol. S. & W. Co. v. Murray, 80 Fed. R. 811; Am. S. & W. Co. v. Wire Drawers' & D. M. Unions. 90 Fed. R. 608; Sherry v. Perkins, 147 Mass. 212; Bruce Bros. v. Evans, 5 Pa. Co. Ct. R. 163.

[14] Vegelahn v. Guntner, 167 Mass. 92; s. c., 44 N. E. R. 1077, with a strong dissent by Field, C. J., and Holmes, J.; Am. S. & W. Co. v. Wire Drawers' & D. M. Unions, 90 Fed. R. 608. *Cf.* Charnock v. Court, [1899] 2 Ch. 35; Trollupe v. London R. T. Fed'n, 72 Law Times, 342; Lyons v. Wilkins, [1899] 1 Ch. 255. But see Allen v. Flood, [1898] Appeal Cases, 1.

[15] Farmers' L. & Tr. Co. v. N. Pac. R. Co., 60 Fed. R. 803, per Jenkins, J.; reversed in Arthur v. Oakes (C. C. A.), 63 Fed. R. 310. *Cf.* U. S. v. Cassidy, 67 Fed. R. 698.

[16] Casey v. Cincinnati Typ. Union, 45 Fed. R. 135; Thomas v. Cincinnati, N. O. & T. Ry. Co., 62 Fed. R. 803; Oxley Stave Co. v. Coopers' I. Union (C. C. A.), 72 Fed. R. 695; s. c., Hopkins v. Oxley Stave Co., 83 Fed. R. 912, Caldwell, J., dissenting; Barr v. Essex Trades Council, 53 N. J. Eq. 101; s. c., 30 Atl. R. 881; Beck v. Ry. Teamsters' Pr. Union, 118 Mich. 497; s. c., 43 L. R. A. 406, with note. *Cf.* Hagan v. Blindell (C. C. A.), 56 Fed. R. 696; Arthur v. Oakes (C. C. A.), 63 Fed. R. 310; Elder v. Whitesides, 72 Fed. R. 724; Davis v. Zimmerman, 91 Hun (N. Y.), 489; Sinsheimer v. United G. W. of Am., 77 Hun (N. Y.), 215; U. S. v. Cassidy, 67 Fed. R. 698; Graham v. St. Charles St. R. Co., 47 La. Ann. 215. But see Reynolds v. Everett, 144 N. Y. 189; Allen v. Flood, [1898] Appeal Cases, 1; Mogul S. S. Co. v. McGregor, 23 Q. B. D. 598; s. c., [1892] Appeal Cases, 25; Mayer v. Journeymen S. C. Ass'n, 47 N. J. Eq. 519; Bohn Mfg. Co. v. Hollis, 54 Minn. 223; s. c., 55 N. W. R. 1119; Sweeny v. Torrence, 11 Pa. Co. Ct. R. 497; Francis v. Flinn, 118 U. S. 385; Worthington v. Waring, 157 Mass. 421; Pr. & Pub. Co. v. Howell, 26 Ore. 527; s. c., 28 L. R. A. 464; DePear v. Cooks Union, 27 Chic. Leg. N. 387.

peal,[17] and an attempt made to impeach the judge who granted it. The importance of this class of injunctions is very great. For the acts forbidden are in most cases offenses punished by the criminal law, those charged with which would, in the absence of an injunction, have the right to a trial by jury; and the object of an injunction is to deprive them of that right.[18] This so-called "government by injunction" has been sharply criticised. The jurisdiction of courts of equity to entertain a suit for such an injunction has been sustained by the Supreme Court of the United States;[19] but the propriety of those which have been issued has not yet been decided by that tribunal.[20]

§ 216. Injunctions to restrain the infringement of patents.— Injunctions to restrain the infringement of patents and copyrights are of ancient use in equity. They are founded upon both the irreparable injury that would otherwise be caused to the complainant, and the desire of the court to prevent a multiplicity of suits.[1] This inherent power of the courts is confirmed in the United States by statute. The provision of the Revised Statutes authorizing injunctions to restrain the infringement of patents is as follows: "The several courts vested with jurisdiction of cases arising under the patent laws shall have power to grant injunctions according to the course and principles of courts of equity, to prevent the violation of any right secured by a patent, upon such terms as the court may deem reasonable; and upon a decree being rendered in any such case for an infringement, the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby; and the court shall assess the same or cause the same to be assessed under its direction. And the court shall have the same power to increase such damages, in its discretion, as is given to increase damages found by verdicts

[17] Arthur v. Oakes (C. C. A.), 63 Fed. R. 310.

[18] In re Debs, 158 U. S. 564, 581, 582; U. S. v. Debs, 64 Fed. R. 724. See U. S. v. Cassidy, 67 Fed. R. 698, 783, for a refusal of a jury to convict in a similar case, upon much stronger evidence than that offered against Debs.

[19] In re Debs, 158 U. S. 564, 581; In re Lennon, 166 U. S. 548.

[20] But see In re Debs, 158 U. S. 564, 581, 592, 597.

§ 216. [1] Eden on Injunctions, chs. xii and xiii; Daniell's Ch. Pr. (5th Am. ed.) 1642–1648; Hogg v. Kirby, 8 Ves. 215; Wilkins v. Aikin, 17 Ves. 422.

in actions in the nature of actions of trespass upon the case."[2] It seems to have been formerly the opinion that courts of equity would not interfere to protect a patent right by injunction, until the right has been established at law; but since Lord Eldon's time their jurisdiction thus to interfere, when the title of a complainant is established by the preponderance of evidence, has been undisputed.[3] Before a preliminary injunction will be granted against the alleged infringement of a patent, it should be shown: that the plaintiff's right to the exclusive use of the invention is clear,[4] and usually that it has been established by a prior adjudication[5] or by public acquiescence;[6]

[2] U. S. R. S., § 4921. See *supra*, §§ 77, 144, and 29 St. at L. 695; cited *supra*, § 22.

[3] Universities of Oxford and Cambridge v. Richardson, 6 Ves. 689; Hill v. Thompson, 8 Meriv. 622; Pierpont v. Fowle, 2 W. & M. 23; Motte v. Bennett, 2 Fisher, 642; Kerr on Injunctions, 272.

[4] Welsbach Lt. Co. v. Cosmopolitan Inc. G. L. Co., 100 Fed. R. 648; Bradley & H. Mfg. Co. v. Charles Parker Co., 17 Fed. R. 240; Consol. S. V. Co. v. Crosby S. G. & L. Co., 7 Fed. R. 768; Illingworth v. Spaulding, 9 Fed. R. 154. For a case where the complainant's rights were held so clear as to warrant a preliminary injunction without a prior adjudication or public acquiescence, see Wilson v. Consol. S. S. Co. (C. C. A.), 88 Fed. R. 286.

[5] Duff Mfg. Co. v. Kalamazoo Ry. Sig. Co., 100 Fed. R. 357; Richmond Milk Co. v. De Clyne, 90 Fed. R. 661. Before the creation of the Circuit Courts of Appeal, the rule was that if previous adjudications in the same or other Circuit Courts had established the validity of the plaintiff's patent, a preliminary injunction would be granted him almost as of course in a subsequent suit, to prevent the infringement of the same by a person not a party to those suits. Orr v. Littlefield, 1 W. & M. 13; Thayer v. Wales, 9 Blatchf. 170; s. c., 5 Fisher, 130; Kirby Bung Mfg. Co. v. White, 1 Fed. R. 604; but see Many v. Sizer, 1 Fish. Pat. Cas. 81; unless the latter could produce new evidence, Page v. Holmes B. A. Tel. Co., 2 Fed. R. 300; s. c., 18 Blatchf. 118; or show that such judgments were obtained by consent, collusion or fraud, Am. Nic. P. Co. v. Elizabeth, 4 Fish. 189; Page v. H. B. A. Tel. Co., 2 Fed. R. 330; American M. Purifier Co. v. Vail, 15 Blatchf. 315; but see Orr v. Littlefield, 1 W. & M. 13. It is settled, however, that the rule depends upon comity, which is not a rule of law, but one of practice, convenience and expediency; that when a judge is clear in his conviction that a previous decision cited, made in another Circuit against an

[6] Palmer P. T. Co. v. Newton R. Works, 73 Fed. R. 218; Duff Mfg. Co. v. Kalamazoo Ry. Sig. Co., 100 Fed. R. 357. Eight months of public acquiescence were held not to be enough. Wilson v. Jefferson, 78 Fed. R. 366. *Cf.* Johnston R. Co. v. Avery Mach. Co., 28 Fed. R. 193; Stahl v. Williams, 52 Fed. R. 645. Five years of public acquiescence were held sufficient. McDowell v. Kurtz (C. C. A.), 77 Fed. R. 206. So of six years. White v. Hunter, 47 Fed. R. 819; Nat. Typ. Co. v. N. Y. Typ. Co., 46 Fed. R. 144.

and that there is no room for reasonable doubt as to the infringement.[7] Laches by the plaintiff may be a ground for refusing a preliminary injunction.[8] If serious public inconvenience would result from a preliminary injunction, the application may be denied.[9] Where the defendant is pecuniarily

other defendant, has been wrongly decided, he is not bound to follow it; and that a case will never be reversed by the Supreme Court merely because insufficient weight was given below to the doctrine of comity. Mast, F. & Co. v. Stover Mfg. Co., 177 U. S. 485, 488, 489; Welsbach Lt. Co. v. Cosmopolitan Inc. El. Co., 100 Fed. R. 648; Horn & Br. Mfg. Co. v. Pelzer, 91 Fed. R. 665; Nat. Cash Reg. Co. v. Amer. C. R. Co. (C. C. A.), 53 Fed. R. 367; Wanamaker v. Enterprise Mfg. Co. (C. C. A.), 53 Fed. R. 791. See also Hatch S. B. Co. v. El. St. Ry. Co. (C. C. A.), 100 Fed. R. 975; Consol. El. S. Co. v. Accumulator Co. (C. C. A.), 55 Fed. R. 485; Am. Paper B. & P. Co. v. Nat. F. B. & P. Co. (C. C. A.), 51 Fed. R. 229; N. Y. Filter Mfg. Co. v. Niagara Falls W. W. Co. (C. C. A.), 80 Fed. R. 924; Adams v. Tannage P. Co. (C. C. A.), 81 Fed. R. 178; Electric Mfg. Co. v. Edison El. L. Co. (C. C. A.), 61 Fed. R. 834; Overman Wheel Co. v. Curtis, 53 Fed. R. 247. A decision of the Supreme Court sustaining a patent in a suit between other parties will be regarded as conclusive upon a motion for a preliminary injunction. Am. Bell Tel. Co. v. McKeesport Tel. Co., 57 Fed. R. 661. It has been held that the decision of the patent office upon an interference is not conclusive against third parties upon a motion for a preliminary injunction. Wilson v. Consol. Store-Service Co. (C. C. A.), 88 Fed. R. 286. *Contra*, Smith v. Halkyard, 16 Fed. R. 414; Celluloid Mfg. Co. v. Chrowlithian C. & C. Co., 24 Fed. R. 275. Decisions of the Canadian courts are entitled to consideration. Carter & Co. v. Wollschlaeger, 53 Fed. R. 573. A decision of the Supreme Court of the District of Columbia has the same weight as that of another Circuit Court. White Dental Mfg. Co. v. Johnson, 56 Fed. R. 262. But see Fenton Met. Mfg. Co. v. Chase, 73 Fed. R. 831. Where, in granting an injunction, the court had followed the decision of another court, upon a motion for an attachment for the violation thereof, it followed the construction put upon the patent by such other court. Accumulator Co. v. Consol. El. Storage Co., 53 Fed. R. 793.

[7] Whippany Mfg. Co. v. United I. F. Co. (C. C. A.), 87 Fed. R. 215; Duff v. Kalamazoo Ry. Sig. Co., 100 Fed. R. 357; Richmond Mica Co. v. De Clyne, 90 Fed. R. 661; Standard Paint Co. v. Reynolds, 43 Fed. R. 304; Johnson R. R. S. Co. v. Union S. & S. Co. (C. C. A.), 55 Fed. R. 487; Hatch S. Ry. Co. v. El. Storage By. Co. (C. C. A.), 100 Fed. R. 975. *Cf.* Sawyer Sp. Co. v. Turner, 55 Fed. R. 979.

[8] United Nickel Co. v. New H. S. M. Co., 17 Fed. R. 528; Waite v. Chichester Chair Co., 45 Fed. R. 258; Keyes v. Pueblo Sm. & Ref. Co., 31 Fed. R. 560. In one case a delay of two months was held such laches as to defeat the application. Ney Mfg. Co. v. Superior Drill Co. (C. C. Ohio), 56 Fed. R. 152. But see Brush El. Co. v. El. Imp. Co., 45 Fed. R. 241; Nat. Heeling Mach. Co. v. Abbott, 77 Fed. R. 462; Collignon v. Hayes, 8 Fed. R. 912; N. Y. G. S. Co. v. Buffalo G. S. Co., 18 Fed. R. 638.

[9] S. W. Brush El. & P. Co. v. La. El. L. Co., 45 Fed. R. 893; Bliss v.

responsible,[10] or offers a bond or undertaking with a sufficient surety that he will pay whatever may be awarded against him for damages or profits, the injunction will usually be denied, unless there has been a previous adjudication sustaining the plaintiff's patent.[12] An *ex parte* application for an injunction to restrain the infringement of a patent should, it seems, be supported by an affidavit, or an allegation in a bill verified by affidavit of the plaintiff, stating that he believes that the person to whom the patent was issued was the original inventor thereof, or that the invention was new, or had not been introduced into public use in the United States for more than two years prior to the application upon which the patent was issued.[13] It has been held that after the expiration of a patent an injunction may issue to prevent the use of a machine made while the patent was in force; and it has been said that an injunction previously issued will, until dissolved by order,

Brooklyn, 4 Fisher's Pat. Cas. 596; Am. Ordnance Co. v. Driggs-Seebury Co., 87 Fed. R. 947; Hoe v. Boston Adv. Corp., 14 Fed. R. 914; Robinson on Patents, § 1200. But see Pelzer v. Binghamton (C. C. A.), 95 Fed. R. 823; N. Y. Filter Mfg. Co. v. Niagara Falls W. Co. (C. C. A.), 77 Fed. R. 900; Westinghouse A. B. Co. v. Great N. Ry. Co., 86 Fed. R. 132. The combination of the complainant with other patentees so as to create a monopoly was held to be no reason for withholding an injunction. Edison El. L. Co. v. Sawyer-Man El. Co. (C. C. A.), 53 Fed. R. 592. But see *infra*, § 223.

[10] N. Y. G. S. Co. v. Amer. G. S. Co., 10 Fed. R. 835; Westinghouse A. B. Co. v. Burton S. C. Co., 70 Fed. R. 619; Nilsson v. Jefferson, 78 Fed. R. 366; Huntington D. P. Co. v. Alpha P. C. Co., 91 Fed. R. 534. Especially when the complainants have established a regular license fee. Overweight C. El. Co. v. Cahill & H. El. Co., 86 Fed. R. 338; Overweight C. El. Co. v. Improved O. of R. M. H. Ass'n (C. C. A.), 94 Fed. R. 155.

[11] Especially in the First Circuit. Nat. Heeling Mach. Co. v. Abbott, 77 Fed. R. 462. See Nat. Cash Reg. Co. v. Navy C. R. Co., 99 Fed. R. 565; Eastern P. B. Co. v. Nixon, 35 Fed. R. 752; McMillan v. Conrad, 16 Fed. R. 128; Eagle Mfg. Co. v. Chamberlain Plow Co., 36 Fed. R. 905; Hoe v. Knap, 27 Fed. R. 204; Geo. A. Macbeth Co. v. Lippincott Glass Co., 54 Fed. R. 167; Washburn & M. Mfg. Co. v. H. B. Scott & Co., 22 Fed. R. 710; Edison El. Lt. Co. v. Columbia Inc. L. Co., 56 Fed. R. 496; N. Y. Belting & P. Co. v. Magowan, 23 Fed. R. 596; Greenwood v. Bracher, 1 Fed. R. 856. But see McWilliams Mfg. Co. v. Blundell, 11 Fed. R. 419; Campbell Pr. Press Co. v. Prieth, 77 Fed. R. 976; Carter & Co. v. Wollschlaeger, 53 Fed. R. 573.

[12] Sometimes even where there had been such an adjudication. Westinghouse A. B. Co. v. Burton S. Car Co. (C. C. A.), 77 Fed. R. 301; Norton v. Eagle Auto. Can Co., 61 Fed. R. 298.

[13] Hill v. Thompson, 3 Meriv. 622; Sturz v. De La Rue, 5 Russ. 322, 329; Sullivan v. Redfield, 1 Paine, 441; U. S. R. S., §§ 4886, 4887.

remain in force so far as still to forbid such a use.[14] But a bill praying for such an injunction must allege either that the defendant is using machines manufactured during the term of the patent and in violation of it, or that the plaintiff has cause to fear such a use.[15] An injunction against the manufacture or sale of articles in violation of a patent right is violated by their sale or manufacture within the United States, but beyond the jurisdiction of the court.[16]

§ 217. Injunctions to restrain the infringements of copyrights.— The Revised Statutes authorize injunctions to prevent the infringement of copyrights, as follows: "The Circuit Courts, and District Courts having the jurisdiction of Circuit Courts, shall have power, upon bill in equity, filed by any party aggrieved, to grant injunctions to prevent the violation of any right secured by the laws respecting copyrights, according to the course and principles of courts of equity, on such terms as the court may deem reasonable."[1] This statute is, however, merely declaratory of the previous rule in equity which, it is said by Lord Eldon, was "founded upon this; that the law does not give a complete remedy to those whose literary property is invaded; for if publication after publication is to be made a distinct cause of action, the remedy would soon become worse than the disease. This court, therefore, interposes by injunction; but not in cases where an action cannot be maintained."[2] The rules regulating the issue of injunctions to prevent the infringement of copyrights are in general similar to those regulating the issue of injunctions restraining the infringement of patents. The plaintiff must show a clear title to his copyright, and an infringement or threatened infringement by the defendant.[3] The injunction will be denied if the defendant shows that the plaintiff has consented to his infringement, or has been guilty of unreasonable delay after he

[14] Am. D. R. B. Co. v. Rutland M. Co., 2 Fed. R. 356. But see Am. Cable Ry. Co. v. Chicago City Ry. Co., 41 Fed. R. 522; Westinghouse v. Carpenter (C. C. A.), 43 Fed. R. 894.

[15] Am. D. R. B. Co. v. Rutland M. Co., 2 Fed. R. 355.

[16] Macaulay v. White S. M. Co., 9 Fed. R. 698.

§ 217. [1] U. S. R. S., § 4970.

[2] Lawrence v. Smith, Jacob, 471, 472.

[3] Chase v. Sanborn, 6 Off. Gaz. 932; Parkinson v. Laselle, 3 Saw. 330; Lawrence v. Dana, 4 Cliff. 1; Yuengling v. Schile, 12 Fed. R. 97; Drone on Copyright, ch. xi, pp. 496-548.

learned that it had occurred or was threatened.[4] How long a time must have elapsed to bar the plaintiff's right to an injunction has not been definitely settled. It has been held in England, however, that an injunction may be obtained after the copyright has been infringed to the plaintiff's knowledge during four years.[5] Moreover, delay will not prejudice him, if solely caused by his waiting until the result of litigation, whether prosecuted by himself or others, to settle a doubtful question of law involving the validity of his title.[6] As has been said, an injunction will not be granted unless the plaintiff shows a plain title to the copyright which he claims; but "the copyright is *prima facie* evidence that he is the author, and the burden of proof is upon the defendant to show the contrary,"[7] or that, for some other reason, there is a defect in the title claimed.[8] And the court will protect an equitable title against infringement unless the defendant possesses superior equities to those of the complainant.[9] The complainant is not obliged to prove damage from the breach of copyright.[10] If there is any doubt concerning the infringement, and its ascertainment will necessitate the examination of a great deal of matter, the court, in this country, usually directs a reference to a master to hear testimony and state the facts, together with his opinion for its consideration, before granting an injunction.[11] Such a reference is usually ordered before the final hearing, but may be at the decree.[12] In England, however, laborious examinations have frequently been made by the judges themselves, unassisted, except by counsel.[13] Instead of a reference, an issue

[4] Rundell v. Murray, Jacob, 311; Saunders v. Smith, 3 Myl. & Cr. 711; Chappell v. Sheard, 1 Jur. (N. S.) 996; Tinsley v. Lacy, 1 Hem. & M. 747; Keene v. Clarke, 5 Robertson (N. Y.), 88, 66, 67; Miller v. M'Elroy, 1 Am. Law Reg. 198.

[5] Hogg v. Scott, L. R. 18 Eq. 444, 454; Drone on Copyright, 504, 512.

[6] Buxton v. James, 5 De G. & Sm. 80; Rumford Chem. Works v. Vice, 14 Blatchf. 179.

[7] Taney, C. J., in Reed v. Carusi, Taney, 72, 74.

[8] Drone on Copyright, 499; Story's Eq. Jur., § 936, note 6.

[9] Little v. Gould, 2 Blatchf. 165.

[10] Reed v. Holliday, 19 Fed. R. 325, 327.

[11] Folsom v. Marsh, 2 Story, 100; Webb v. Powers, 2 W. & M. 497; Story v. Derby, 4 McLean, 160; Greene v. Bishop, 1 Cliff. 186; Lawrence v. Dana, 4 Cliff. 1; West Pub. Co. v. Lawyers' Co-operative Pub. Co., 64 Fed. R. 360; s. c. (C. C. A.), 79 Fed. R. 756; Drone on Copyright, 513. But see Smith v. Johnson, 4 Blatchf. 252.

[12] Lawrence v. Dana, 4 Cliff. 1; Drone on Copyright, 513.

[13] Lewis v. Fullarton, 2 Beav. 6; Murray v. Bogue, 1 Drew. 353; Jar-

at law may be directed.[14] The plaintiff need not specify in either his bill or his affidavit the parts of the defendant's publication which he thinks have been taken from his work. A general allegation of infringement accompanied by a verification by affidavit of the two works is sufficient.[15] The practice has been that, "when the injunction has been moved for, the two works have been brought into court, and the counsel have pointed out to the court the passages which they rely upon as showing the piracy."[16] Clearer proof and a stronger case than would be sufficient to entitle a plaintiff to an injunction after the hearing is often required before he can obtain an interlocutory injunction.[17] The difficulty of accurately determining the damages resulting from an unauthorized publication of his work will often have weight in leading the court to grant a preliminary injunction, when otherwise it might refuse one.[18] But, on the other hand, the court will often refuse an injunction before the hearing, when it is plain that the defendant would suffer more injury from being obliged to discontinue the publication than will result to the plaintiff from his continuing it.[19] It has been held in England that if a work be libelous, immoral, or blasphemous, which last named term would include one "which impugned the doctrines of the immateriality and immortality of the soul,"[20] there can be no copyright therein, and a piratical edition thereof will not be enjoined.[21] These decisions, however, one of which stigmatized as unworthy of protection Byron's "Cain,"[22] have been severely criticised,[23] and it is not likely that they would be fully sustained

rold v. Houlston, 3 Kay & J. 708; Pike v. Nicholas, L. R. 5 Ch. 251; Drone on Copyright, 513.

[14] Jollie v. Jaques, 1 Blatchf. 618.

[15] Farmer v. Calvert L. Co., 1 Flip. 228, 235; Sweet v. Maugham, 11 Sim. 51; Drone on Copyright, 513.

[16] Sweet v. Maugham, 11 Sim. 51, 53.

[17] Johnson v. Wyatt, 2 De G., J. & S. 18; Drone on Copyright, 517, 518.

[18] Matthewson v. Stockdale, 12 Ves. 270; Wilson v. Luke, 1 Vict. Law R. 127; Prince Albert v. Strange, 1 Mac. & G. 25, 46; Little v. Gould, 2 Blatchf. 165; Drone on Copyright, 516–519.

[19] Spottiswoode v. Clarke, 2 Phil. 154; Cox v. Land & W. J. Co., L. R. 9 Eq. 324; Lodge v. Stoddart, 9 Rep. 137. But see Emerson v. Davies, 3 Story, 768.

[20] Lawrence v. Smith, Jacob, 471.

[21] Walcot v. Walker, 7 Ves. 1; Stockdale v. Onwhyn, 5 Barn. & Cr. 173; Murray v. Benbow, 6 Petersd. Abr. 559; Lawrence v. Smith, Jacob, 471; Southey v. Sherwood, 2 Meriv. 435. But see Burnett v. Chetwood, 2 Meriv. 441.

[22] Murray v. Benbow, 6 Petersd. Abr. 559.

[23] Campbell's Lives of the Lord Chancellors, ch. ccxiii; Drone on Copyright, 181–196.

if the question should be raised in the United States; although in a case in the Federal courts Judge Deady assigned as one among several reasons for refusing to enjoin an unauthorized representation of "The Black Crook," that it "only attracts attention as it panders to a prurient curiosity or an obscene imagination by very questionable exhibitions and attitudes of the female person."[24] The injunction forbids the publication of only so much of the defendant's work as infringes upon the copyright of the plaintiff.[25]

§ 218. Injunctions to restrain the unlawful use of trade-marks.— Injunctions to restrain the use of trade-marks by others than their owners are granted by courts of equity, it has been said, partly to prevent the fraud upon the public which would otherwise be perpetrated, and partly on account of the difficulty of estimating the injury which would be caused the owner of a trade-mark from its improper use.[1] The former ground of the interference of the court has, however, been expressly repudiated by a great judge, Lord Westbury, who said, when Lord Chancellor, in delivering the judgment in a leading case: "Imposition upon the public becomes the test of the property in the trade-mark having been invaded and injured, but not the ground on which the court rests its jurisdiction."[2] "Trade-marks are of two kinds. They may consist of pictures or symbols or a peculiar form and fashion of label, or simply of a word or words, which, in whatever form printed or represented, continue to be the distinguishing mark of the manufacturer who has appropriated it or them, and the name by which his products are known and dealt in."[3] "Where the trade-mark consists of a picture or symbol, or in any peculiarity in the appearance of the label, the imitation must be such as to amount to a false representation, liable to deceive the public, and enable the imitator to pass off his goods as those of

[24] Martinetti v. Maguire, 1 Deady, 216, 223.

[25] Webb v. Powers, 2 W. & M. 497; Story v. Holcombe, 4 McLean, 306; Farmer v. Elstner, 33 Fed. R. 494.

§ 218. [1] Perry v. Truefit, 6 Beav. 66, 73; Croft v. Day, 7 Beav. 84; Leather C. Co. v. American L. C. Co., 10 Jur. (N. S.) 81; Walton v. Crowley, 3 Blatchf. 440; Shaw Stocking Co. v. Mack, 12 Fed. R. 707.

[2] Leather C. Co. v. American L. C. Co., 10 Jur. (N. S.) 81. But see the language of Coxe, J., in Shaw Stocking Co. v. Mack, 12 Fed. R. 707, 710.

[3] Judge Rapallo in Hier v. Abrahams, 82 N. Y. 519, 523.

the person whose trade-mark is imitated. And when there is such an absence of resemblance that ordinary attention would enable customers to discriminate between the trade-marks of different parties, the court will not interfere."[4] "But where the trade-mark consists of a word, it may be used by the manufacturer who has appropriated it, in any style of print, or in any form of label, and its use by another is unlawful. The statute" of New York "requires only that the imitation should be either the same to the eye, or in sound to the ear, as the genuine trade-mark, and this accords with the authorities."[5] "To make an exclusive right to use a name or symbol as a trade-mark, such use must be new; if ever before used as applicable to a like article, it cannot be exclusively appropriated. If the article is known to commerce in general, by the term claimed, as a trade-mark, the claim is ill-founded. If the term employed indicates the nature, kind, or quality of the article, instead of showing its origin, an exclusive right to its use is not maintainable."[6] In accordance with the maxim that he who seeks equity must come with clean hands, it is well established that, if the trade-mark for which protection is sought contains representations calculated to deceive the public, an injunction will be denied the plaintiff.[7] An act of Congress allowing suits to enjoin the use of trade-marks to be brought in a Federal court against a citizen of the same State as the complainant, was held unconstitutional.[8] A subsequent act of Congress gives the Federal courts jurisdiction of such a suit when the plaintiff has registered his trade-mark for use in foreign commerce or commerce with the Indian tribes, and the defendant has used such registered trade-mark in such commerce.[9] The constitutionality of this act is an open question.[10] This statute does not give the Federal courts jurisdiction of a suit between citizens of the same State to enjoin unfair competition in trade, where the complainant has no valid and exclusive trade-mark.[11]

[4] Ibid.

[5] Ibid.

[6] Van Beil v. Prescott (The Rye & Rock Case), 82 N. Y. 630.

[7] Leather C. Co. v. American L. C. Co., 11 H. L. C. 523; s. c. in a lower court, 10 Jur. (N. S.) 81; Fowle v. Spear, 7 Penn. L. J. 176; Heath v. Wright, 3 Wall. Jr. 141; Ginter v. Kinney Tobacco Co., 12 Fed. R. 782.

[8] Trade-Mark Cases, 100 U. S. 82.

[9] 21 St. at L. 502; Graveley v. Graveley, 42 Fed. R. 264.

[10] Elgin Nat. Watch Co. v. Illinois Tr. C. Co., 179 U. S. 665.

[11] Ibid.

§ 219. Injunctions to prevent the opening of letters.— Injunctions may be granted to restrain the opening of business letters.[1]

§ 220. Injunctions to compel the performance or prevent the breach of contracts not affecting land.— The performance of a contract not affecting lands will be enforced in equity by means of an injunction when, and only when, a judgment for damages would be no adequate remedy for its breach;[1] and it does not require a purely personal act which it would be impossible for the court to enforce.[2] The inadequacy of the remedy at law which will entitle one to specific performance of a contract may, it has been held, be proved by the fact that the damages in money cannot be ascertained.[3] In some cases an injunction may be obtained to restrain a defendant from violating a negative promise contained in a contract, although the court has no power specifically to enforce the affirmative promises contained therein. Thus, when opera singers of extraordinary talent had contracted to sing at the plaintiffs' theatre and nowhere else, injunctions have been granted to restrain them from singing in rival establishments, although they could not be compelled to sing for the plaintiffs.[4] The rule has been thus stated by Judge Lowell: "I think the fair result of the later cases may be thus expressed: If the case is one in which the negative remedy of injunction will do substantial justice between the parties, by obliging the defendant either to carry out his contract or lose all benefit of the breach, and the remedy at law is inadequate, and there is no reason of policy against it, the court will interfere to restrain conduct which is contrary to the contract, although it may be unable to enforce a specific performance of it."[5] But where the affirmative promise cannot

§ 219. [1] Scheile v. Brakell, 11 W. R. 796; David Kennedy Corp. v. Kennedy, 165 N. Y. 353, 359.

§ 220. [1] Buxton v. Lister, 3 Atk. 383; Robinson v. Cathcart, 2 Cranch C. C. 590; Tayloe v. Merchants' Fire Ins. Co., 9 How. 390; Very v. Levy, 13 How. 345.

[2] Clarke v. Price, 2 Wilson Ch. Cas. 157; Mair v. Himalaya T. Co., L. R. 1 Eq. 411.

[3] Adderley v. Dixon, 1 Sim. & Stu. 607; Sullivan v. Tuck, 1 Md. Ch. 59; Finley v. Aiken, 1 Grant's Cases (Pa.), 83; Bispham's Eq., § 369.

[4] Lumley v. Wagner, 1 De G., M. & G. 604; McCaull v. Braham, 16 Fed. R. 37.

[5] Singer Co. v. Union Co., 1 Holmes, 253, 258. See also Goddard v. Wilde, 17 Fed. R. 845; W. U. Tel. Co. v. Union Pac. Ry. Co., 3 Fed. R. 423; W. U. Tel. Co. v. St. Joseph & W. Ry. Co., 3 Fed. R. 430.

be specifically enforced, the court will not import into it a negative covenant, neither expressly nor by a fair implication contained therein.[6] It has been held that a court should not enjoin laborers from striking nor from advising other laborers to join in a strike;[7] but that it may enjoin them from combining to quit work in order to cripple their employer's property and embarrass his business;[8] and from refusing to handle or operate cars while remaining in the employ of a railroad company.[9]

§ 221. Injunctions to compel the delivery of personal property tortiously withheld.— Under very extraordinary circumstances, equity will interfere to compel by injunction the delivery or return of letters, documents, or other articles of such a unique character that it would be impossible to replace them, when they are tortiously withheld from their rightful owners.[1]

§ 222. Injunctions authorized by statute.— The statutes of the United States also authorize an injunction in the following cases, amongst others, besides those arising from infringements of patents and copyrights: "Any person who considers himself aggrieved by any warrant of distress issued under the" provisions of the statutes authorizing one to be issued by the Solicitor of the Treasury against an officer in default for not accounting for and paying over public money received by him, "may prefer a bill of complaint to any district judge of the United States, setting forth therein the nature and extent of the injury of which he complains; and thereupon the judge may grant an injunction to stay proceedings on such warrant altogether, or for so much thereof as the nature of the case requires. But no injunction shall issue till the party applying for it gives bond with sufficient security, in a sum to be prescribed by the judge, for the performance of such judgment as

[6] Clarke v. Price, 2 Wilson Ch. C. 157; Pickering v. Bishop of Ely, 2 Y. & C. Ch. C. 249; Johnson v. S. & B. Ry. Co., 3 De G., M. & G. 914; Bispham's Eq., § 464; Kerr on Injunctions, 524.

[7] Arthur v. Oakes (C. C. A.), 63 Fed. R. 310.

[8] Arthur v. Oakes (C. C. A.), 63 Fed. R. 310, 324, 329, a decision on this point of very doubtful authority. *Cf.* Allen v. Flood, Appeal Cases (1898), 1; *supra*, § 215.

[9] S. Cal. Ry. Co. v. Rutherford, 62 Fed. R. 796; In re Lennon, 166 U. S. 548, 555.

§ 221. [1] Pusey v. Pusey, 1 Vern. 273; Duke of Somerset v. Cookson, 3 P. Wms. 389; Clarke v. White, 12 Pet. 178; Prince Albert v. Strange, 1 Macn. & G. 25, 42; McGowin v. Remington, 12 Pa. St. 56.

may be awarded against him; nor shall the issuing of such injunction in any manner impair the lien produced by the issuing of the warrant. And the same proceedings shall be had in such injunction as in other cases, except that no answer shall be necessary on the part of the United States; and if, upon dissolving the injunction, it appears to the satisfaction of the judge that the application for the injunction was merely for delay, the judge may add to the lawful interest assessed on all sums found due against the complainant such damages as, with such lawful interest, shall not exceed the rate of ten per centum a year. Such injunction may be granted or dissolved by the district judge either in or out of court."[1] "When the district judge refuses to grant an injunction to stay proceedings on a distress warrant, as aforesaid, or dissolves such injunction after it is granted, any person who considers himself aggrieved by the decision in the premises may lay before the circuit justice, or circuit judge of the circuit within which such district lies, a copy of the proceeding had before the district judge; and thereupon the circuit justice or circuit judge may grant an injunction, or permit an appeal, as the case may be, if, in his opinion, the equity of the case requires it. The same proceedings, subject to the same conditions, shall be had upon such injunction in the Circuit Court as are prescribed in the District Court."[2] "Whenever an association against which proceedings have been instituted, on account of any alleged refusal to redeem its circulating notes as aforesaid, denies having failed to do so, it may, at any time within ten days after it has been notified of the appointment of an agent, as provided in section fifty-two hundred and twenty-seven" of the Revised Statutes of the United States, "apply to the nearest Circuit, or District, or Territorial court of the United States to enjoin further proceedings in the premises; and such court, after citing the Comptroller of the Currency to show cause why further proceedings should not be enjoined, and after the decision of the court or finding of a jury that such association has not refused to redeem its circulating notes, when legally presented, in the lawful money of the United States, shall make an order enjoining the Comptroller, and any receiver acting under his direction, from all further proceedings on ac-

§ 222. [1] U. S. R. S., § 3636. [2] U. S. R. S., § 3637.

count of such alleged refusal."[3] A district attorney of the United States acting under the direction of the Attorney-General may upon a petition obtain an injunction to restrain a contract, combination in the form of a trust or otherwise, or a conspiracy in restraint of trade or commerce, or a monopoly of any part of trade or commerce among the several States or with foreign nations.[4] Compliance with the interstate commerce act may also, in certain cases, be compelled by an injunction.[5]

§ 223. When injunctions will not issue.— As a general rule, it may be stated that an injunction will not issue at the prayer of one who will suffer no pecuniary injury from the act which he wishes to prevent.[1] Thus, one will not be granted at the suit of a State to prevent the invasion of a purely political right;[2] or of adjacent property owners and church members to prevent a railroad from outraging their religious feelings by running cars upon Sunday;[3] nor at the suit of a minister of the gospel to prevent the use of his building for theatrical purposes, under a lease the validity of which he disputes.[4] The Emperor of Austria and King of Hungary, however, was allowed an injunction to prevent Kossuth and his associates from manufacturing in England paper currency not purporting to be issued by imperial authority, intended for circulation in Hungary, upon the ground that his property rights were thereby injured.[5] An injunction will not issue to prevent an injury which is not actually threatened to the complainant.[6] Thus an injunction will not be granted to prevent an injury to a navigable stream, at the suit of an individual who is not

[3] U. S. R. S., § 5237.

[4] 26 St. at L., ch. 647, p. 209; 28 St. at L., p. 570; U. S. v. Trans-Missouri Freight Ass'n, 166 U. S. 290; U. S. v. Joint Traffic Ass'n, 171 U. S. 505; Addyston P. & S. Co. v. U. S., 175 U. S. 211. It has been held that this statute applies to a strike intended to prevent the operation of a railroad used for interstate commerce. Thomas v. Cincinnati, N. O. & T. P. Ry. Co., 62 Fed. R. 803, 821; U. S. v. Agler, 62 Fed. R. 824; U. S. v. Elliott, 62 Fed. R. 801; U. S. v. Workingmen's A. C. of N. O., 54 Fed. R. 994; In re Lennon, 166 U. S. 548. But see U. S. v. Patterson, 55 Fed. R. 605.

[5] 24 St. at L. 380.

§ 223. [1] High on Injunctions, § 20.

[2] Georgia v. Stanton, 6 Wall. 50.

[3] Sparhawk v. Union P. R. Co., 54 Pa. St. 401.

[4] Bodwell v. Crawford, 26 Kan. 292.

[5] Emperor of Austria v. Day, 2 Giff. 628; s. c. on appeal, 3 De G., F. & J. 217.

[6] Slessinger v. Buckingham, 17 Fed. R. 454.

engaged in navigating the same;[7] nor, at the suit of a coupon holder who is not liable to the payment of taxes to a State, to prevent the State officers from refusing to receive his coupons, when tendered by others to whom he has agreed to assign them for the payment of their taxes, in pursuance of a contract made by the State with its creditors and their successors.[8] "No court sits to determine questions of law *in thesi*."[9] A threat of irreparable injury to a right actually enjoyed and exercised by the complainant, or acts indicating a preparation to commit such a wrong, are, however, always a ground for the issue of an injunction.[10] And after a defendant has once infringed a patent owned by the plaintiff, it seems that the court will usually enjoin him from doing so in the future, even though he swears that he has no intention of doing so again; unless he further proves that he has paid all damages, occasioned by his infringement, and has desisted from it.[11] The Circuit Court for the Southern District of New York has refused to grant a preliminary injunction to restrain an obstruction to navigation in a navigable channel coming up from the Bay of New York, caused by a structure projecting from the New Jersey shore.[12] An injunction cannot be issued against the United States;[13] nor against an officer to interfere with the exercise of his discretion;[14] nor against an officer of the United

[7] Spooner v. McConnell, 1 McLean, 337. See also Mason v. Rollins, 2 Biss. 99. *Cf.* Works v. Junction R. Co., 5 McLean, 425.

[8] Virginia Coupon Cases, Marye v. Parsons, 114 U. S. 325.

[9] Matthews, J., in Virginia Coupon Cases, Marye v. Parsons, 114 U. S. 325, 330.

[10] St. Louis v. Knapp Co., 104 U. S. 658; Sherman v. Nutt, 35 Fed. R. 149; Butz Thermo-El. Reg. Co. v. Jacobs El. Co., 36 Fed. R. 191; McArthur v. Kelly, 5 Ohio, 139; Frearson v. Loe, L. R. 9 Ch. D. 48. See also Piek v. C. & N. W. Ry. Co., 6 Biss. 177.

[11] Jenkins v. Greenwald, 1 Bond, 126; s. c., 2 Fisher, 87; Sickels v. Mitchell, 3 Blatchf. 548; Poppenhusen v. N. Y. G. P. C. Co., 4 Blatchf. 184; Celluloid Mfg. Co. v. Arlington Mfg. Co., 34 Fed. R. 824. But see Home Ins. Co. v. Nobles, 63 Fed. R. 642.

[12] Atlantic D. Co. v. Bergen Neck Ry. Co., 44 Fed. R. 208.

[13] U. S. v. McLemore, 4 How. 286; Hill v. U. S., 9 How. 386.

[14] Mississippi v. Johnson, 4 Wall. 475; Walker v. Smith, 21 How. 579; McElrath v. McIntosh, 1 Law R. (N. S.) 399; Warner V. S. Co. v. Smith, 165 U. S. 28; Smith v. Raynolds, 9 D. C. App. 287, 166 U. S. 717. An injunction has been issued to restrain the Secretary of the Interior from the commission of an act beyond his jurisdiction which would cause an irreparable injury to the plaintiff. Noble v. Union R. L. R. Co., 147 U. S. 165. *Cf.* U. S. v. Nourse, 9 Pet. 8; Kirwan v. Murphy (C. C. A.), 83 Fed.

States to prevent the infringement of a patent by him while in the exercise of his official duties.[15] The Revised Statutes provide that "No suit for the purpose of restraining the assessment or collection of any tax" imposed by the United States for purposes of internal revenue, "shall be maintained in any court."[16] Under this provision, it has been held that wherever a tax is imposed by a person in office having authority over the assessment of taxes for the United States, and acting under color of a statute, no injunction will be issued to restrain its collection, no matter how erroneous the assessment may be, and although the person against whom the assessment is made does not own the property taxed.[17] "It is sufficient that a statute has authorized the assessor to entertain the general subject of taxation; that it was in fact entertained, and a judgment, lawful or unlawful, was rendered concerning it."[18] It seems that the unconstitutionality of the statute imposing the tax will not authorize the issue of an injunction;[19] but it has been held that a bill to restrain a trustee from voluntarily making a return of his income and from paying an unconstitutional income tax is not within the prohibition of the statute.[20] An injunction cannot issue against a State at the suit of a citizen of another State or of a foreign State.[21] Nor can a mandatory injunction issue against an officer of a State so as to compel

R. 275; s. c., 49 U. S. App. 659. It has been held that a State court has no power to enjoin an officer of the United States. People ex rel. Brewer v. Kidd, 23 Mich. 440. It has been held that an injunction will not issue to restrain the Commissioner of Patents from issuing letters-patent. Illingworth v. Atha, 42 Fed. R. 141.

[15] James v. Campbell, 104 U. S. 356; Hollister v. Benedict & B. Mfg. Co., 113 U. S. 59, 67; Belknap v. Schild, 161 U. S. 10; *supra*, § 36; *infra*, § 442.

[16] U. S. R. S., § 3224. It has been held that a mandatory injunction requiring a collector of internal revenue to accept an export bond for spirits in a warehouse and to allow their withdrawal for export, without payment of taxes, is in effect a bill to restrain the collection of internal revenue, and cannot be granted. Miles v. Johnston, 59 Fed. R. 38.

[17] Kensett v. Stivers, 10 Fed. R. 517; Pullan v. Kinsinger, 2 Abb. U. S. 94; Howland v. Soule, Deady, 413; Delaware R. Co. v. Prettyman, 17 Int. Rev. Rec. 99; Alkan v. Bean, 23 Int. Rev. Rec. 351; Kissinger v. Bean, 7 Biss. 60; U. S. v. Black, 11 Blatchf. 538. But see Frayser v. Russell, 3 Hughes, 227.

[18] Emmons, J., in Pullan v. Kinsinger, 2 Abb. U. S. 94, 99.

[19] Robbins v. Freeland, 14 Int. Rev. Rec. 28; Moore v. Miller, 5 D. C. App. 413.

[20] Pollock v. Farmers' L. & Tr. Co., 157 U. S. 429, 454, 658.

[21] Eleventh Amendment of the Constitution.

the action of the State against its expressed will.[22] But an officer of a State may be enjoined from an invasion of private rights which would cause irreparable injury, when about to act under an unconstitutional State statute.[23] As has been said before, an injunction will not ordinarily be granted to stay proceedings in a State court.[24] In England, a person may be restrained from petitioning or applying to the legislature in order to procure the passage of an act relating solely to private interests, provided he be under an express or implied agreement not to do so, or his doing so would amount to a breach of trust.[25] This doctrine has, however, never been upheld in the United States, and in a well-considered case in New Jersey was expressly repudiated.[26] The early English cases held that an injunction would not issue to restrain the publication of a slander or libel, no matter how injurious it might be to the complainant.[27] Since the passage of the Judicature Act, however, such injunctions have been granted there in order to protect rights of property.[28] An injunction was denied when sought to prevent a defendant from advertising that a patent was void, and it appeared that he honestly believed it to be so, and published the statement for the sole purpose of protecting what he believed to be his rights.[29] Whether a Federal court

[22] Louisiana v. Jumel, 107 U. S. 711; Antoni v. Greenhow, 107 U. S. 769, 782–784: Cunningham v. M. & B. R. Co., 109 U. S. 446; *supra*, § 37. But see McCauley v. Kellog, 2 Woods, 13.

[23] Osborn v. Bank of U. S., 9 Wheat. 738; Davis v. Gray, 16 Wall. 203; Board of L. v. McComb, 92 U. S. 531; Virginia Coupon Cases, 114 U. S. 269; Louisiana v. Layarde, 60 Fed. R. 186. See, however, In re Ayers, 123 U. S. 443; *supra*, § 37.

[24] U. S. R. S., § 720; *supra*, § 211; *infra*, § 391.

[25] Ware v. Grand J. W. W. Co., 2 Russ. & M. 470; Stockton & H. Ry. Co. v. Leeds & Th. Ry. Co., 2 Phil. 666; Heathcote v. N. S. Ry. Co., 2 Mac. & G. 100.

[26] Story v. J. C. & B. P. P. R. Co., 1 C. E. Green (16 N. J. Eq.), 13.

[27] Prudential Assur. Co. v. Knott, L. R. 10 Ch. 142; Clark v. Freeman, 11 Beav. 112. See also Brandreth v. Lance, 8 Paige (N. Y.), 24; Mauger v. Dick, 55 How. Pr. (N. Y.) 132; Singer Mfg. Co. v. Domestic S. M. Co., 49 Ga. 70; Boston D. Co. v. Florence Mfg. Co., 114 Mass. 69; Whitehead v. Kitson, 119 Mass. 484; Smith v. Hutchinson S. B. Co., 110 Mo. 492.

[28] Thorley's C. F. Co. v. Massam, L. R. 6 Ch. D. 582; Saxby v. Easterbrook, L. R. 3 C. P. D. 339; Wren v. Weild, L. R. 4 Q. B. 730. See also Grand Rapids S. F. Co. v. Haney S. F. Co., 92 Mich. 558; s. c., 52 N. W. R. 1009.

[29] Halsey v. Brotherhood, 45 L. T. (N. S.) 640; Celluloid Mfg. Co. v. Goodyear D. V. Co., 13 Blatchf. 375; Pentlarge v. Pentlarge, 14 Repr. 579; N. F. Filter Co. v. Schwartzwalder, 58 Fed. R. 577.

will in any case grant an injunction against the publication of a libel is a disputed question.[30] It has been held that an injunction may be granted against the publication and circulation of posters and handbills in aid of a boycott,[31] and of threats to commit an unlawful act.[32] An injunction will not issue to assist in the maintenance of a monopoly injurious to public policy;[33] nor in any other case when its operation would be repugnant to public policy.[34] An injunction will not issue when the moving party has a plain, adequate, and complete remedy at law.[35] United States Revised Statutes, section 5242, provides that "No attachment, injunction or execution shall be issued against a 'national bank' association or its property before final judgment in any suit, action, or proceeding in any State, county, or municipal court."

§ 224. Distinction between the judicial writ and the writ remedial.— Injunctions were formerly either judicial writs or writs remedial. A judicial writ was a direction to yield up, to quiet, or to continue the possession of lands, and is said to be in the nature of a writ of execution.[1] It was issued in aid of, and only after a final decree in equity; and, in extraordinary circumstances, in aid of a judgment at law.[2] Under the equity

[30] Held that it can, in Ide v. Ball Engine Co., 31 Fed. R. 901, U. S. C. C., S. D. Illinois, by Allen J.; Emack v. Kane, 34 Fed. R. 46, U. S. C. C., N. D. Illinois, by Blodgett, J.; Home Ins. Co. v. Nobles, 63 Fed. R. 642. *Cf.* Palmer v. Travers, 20 Fed. R. 501, U. S. C. C., S. D. N. Y., by Wheeler, J.; Celluloid Mfg. Co. v. Goodyear D. V. Co., 13 Blatchf. 375, U. S. C. C., S. D. N. Y., by Hunt, J. Held that it cannot, in Kidd v. Horry, 28 Fed. R. 773, U. S. C. C., E. D. Pa., by Bradley and McKennan, JJ.; Baltimore C. W. Co. v. Bemis, 29 Fed. R. 95, U. S. C. C., D. Mass., by Colt and Carpenter, JJ.; Fougeres v. Murbarger, 44 Fed. R. 292, U. S. C. C., D. Indiana, by Woods, J.; International T. C. Co. v. Carmichael, 44 Fed. R. 350, 351, U. S. C. C., E. D. Wis., by Jenkins, J. See Francis v. Finn, 118 U. S. 385; Kelley v. Ypsilanti, D. S. M. Co., 44 Fed. R. 19, 23.

[31] Casey v. Cincinnati Typ. Union No. 8, 45 Fed. R. 135; Coeur d'Alene Cons. & Min. Co. v. Miners' Union, 51 Fed. R. 260.

[32] Continental Ins. Co. v. Board of Fire Underwriters, 67 Fed. R. 310.

[33] Pullman P. C. Co. v. Texas & Pac. Ry. Co., 11 Fed. R. 625; s. c., 4 Woods, 317; Foll's Appeal, 91 Pa. St. 434, 438. But see Edison El. Lt. Co. v. Sangerman El. Co. (C. C. A.), 53 Fed. R. 592; *supra*, § 216.

[34] Bryant v. W. U. Tel. Co., 17 Fed. R. 825; Blake v. Greenwood Cem., 14 Blatchf. 342; Denehey v. Harrisburg, 2 Pearson (Pa.), 330, 334.

[35] U. S. R. S., § 723.

§ 224. [1] Eden on Injunctions, chs. i and xvii, pp. 1, 2, 261, 262; Beames' Orders, 8, 16.

[2] Boult v. Blunt, Cary, 72; Eden on Injunctions, 262.

rules, however, it is never necessary; and it had previously fallen into disuse in England. All other injunctions are writs remedial.

§ 225. Distinction between mandatory and prohibitory injunctions.— Injunctions are either mandatory or prohibitory. A mandatory injunction is one that commands a defendant to perform a certain act or acts; a prohibitory injunction, one that forbids a defendant's doing a certain act or acts. Mandatory are far less common than are prohibitory injunctions. Those most frequently issued have been such as commanded a defendant to abate a nuisance,[1] or to deliver the possession of land.[2] They also have been granted to compel the return of letters and other documents,[3] the delivery of personal property whose loss could not be compensated in damages,[4] the giving of collateral security in obedience to a contract,[5] the making of a policy of insurance,[6] the stopping and receiving freight by a railroad company at a particular place,[7] the performance of a contract by one railroad company to send freight over the lines of another railroad,[8] the receipt of freight cars and passengers from one railroad company by another, and the transportation of the same,[9] the furnishing of equal facilities by a railroad company to another railroad company,[10] or to a shipper,[11] and the rescission of an order for the boycott of a railway company.[12] In a case involving the constitutionality of

§ 225. [1] Lane v. Newdigate, 10 Ves. 192; Robinson v. Lord Byron, 1 Bro. C. C. 588; Hervey v. Smith, 1 K. & J. 389; Rankin v. Huskisson, 4 Sim. 13; Bickett v. Morris, L. R. 1 H. L. Sc. 47; Cole S. M. Co. v. Virginia & G. H. W. Co., 1 Saw. 470.

[2] Hepburn v. Auld, 5 Cranch, 262; Hepburn v. Dunlop, 1 Wheat. 170; Findlay v. Hinde, 1 Pet. 241; Pokegama S. P. L. Co. v. Klamoth R. L. & I. Co., 86 Fed. R. 528.

[3] Evitt v. Price, 1 Sim. 483; Seton on Decrees (4th ed.), 179. See also Clarke v. White, 12 Pet. 178.

[4] Pusey v. Pusey, 1 Vern. 273; Duke of Somerset v. Cookson, 3 P. Wms. 389; Greatrex v. Greatrex, 1 De G. & Sm. 692; McGowin v. Remington, 12 Pa. St. 56.

[5] Robinson v. Cathcart, 2 Cranch C. C. 590.

[6] Union M. Ins. Co. v. Commercial Mut. M. Ins. Co., 2 Curt. 524.

[7] Coe v. Louisville & N. R. Co., 8 Fed. R. 775; McCoy v. Cincinnati, L., St. L. & C. R. Co., 13 Fed. R. 3.

[8] Chicago & A. Ry. Co. v. N. Y., L. E. & W. R. Co., 34 Fed. R. 516.

[9] Chicago, B. & Q. Ry. Co. v. Burlington, C. R. & N. Ry. Co., 34 Fed. R. 481; Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co., 54 Fed. R. 730; In re Lennon, 166 U. S. 548.

[10] Ibid.

[11] Butchers' & D. St. Co. v. Louisville, S. & N. R. Co. (C. C. A.), 67 Fed. R. 35; Wells, F. & Co. v. N. Pac. Ry. Co., 23 Fed. R. 469.

[12] Chicago, B. & Q. Ry. Co. v. Bur-

certain Kentucky statutes, the court refused a mandatory injunction compelling a distribution of the money raised by a tax upon white people partly among public schools for colored children, in the absence of any contract right or legislative authority for such a distribution; but granted "a decree enjoining and restraining the proper parties from applying to the use of the schools organized for and at which white children only are allowed to attend, one-fourth of the money heretofore, or which may be hereafter, collected under the authority of the act of 1871 and its amendments."[13] Mandatory injunctions are usually issued in a negative form, restraining a defendant from desisting or refusing to do an act.[14] They are very rarely granted upon an interlocutory motion.[15]

§ 226. Distinction between provisional and perpetual injunctions.— Provisional, also called preliminary or interlocutory, injunctions are such as are to continue until a certain time usually specified therein; for example, until the coming in of the defendant's answer, the hearing of the cause, the master's report, or the further order of the court.[1] Perpetual, also called final, injunctions are those which, as their name denotes, perpetually restrain the defendant from the same act or acts. Provisional injunctions may be granted at any time during the progress of a suit. Perpetual injunctions can never

lington, C. R. & N. Ry. Co., 34 Fed. R. 481; Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co., 54 Fed. R. 730; In re Lennon, 166 U. S. 548. See So. Cal. Ry. Co. v. Rutherford, 62 Fed. R. 796.

[13] Barr, J., in Claybrook v. Owensboro, 23 Fed. R. 634, 636.

[14] Southern Exp. Co. v. St. Louis, I. M. & S. Ry. Co., 10 Fed. R. 210, 869; Smith v. Smith, L. R. 20 Eq. 500, 504; Cole S. M. Co. v. Virginia & G. H. W. Co., 1 Saw. 470.

[15] Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co., 13 Fed. R. 546; McCauley v. Kellogg, 2 Woods, 13; Camblos v. Phil. & R. R. Co., 9 Phila. (Pa.) 411; s. c., 4 Brews. (Pa.) 563; Rogers L. Works v. Erie Ry. Co., 5 C. E. Green (20 N. J. Eq.), 379; Miles v. Johnston, 59 Fed. R. 38. But see Dinsmore v. L. C. & L. Ry. Co., 2 Fed. R. 465; Dinsmore v. L., N. A. & C. R. Co., 3 Fed. R. 593; Coe v. L. & N. R. Co., 3 Fed. R. 775; Ormsby v. Union Pac. R. Co., 4 Fed. R. 706; Texas Exp. Co. v. Texas & P. Ry. Co., 6 Fed. R. 426; Chicago & A. Ry. Co. v. N. Y., L. E. & W. R. Co., 34 Fed. R. 516; C. S. M. Co. v. V. & G. H. W. Co., 1 Saw. 685; Chicago, B. & Q. Ry. Co. v. Burlington, C. R. & N. Ry. Co., 34 Fed. R. 481; Southern Pac. R. Co. v. City of Oakland, 58 Fed. R. 50; In re Lennon, 166 U. S. 548; Pokegama S. P. L. Co. Klamoth R. L. & I. Ry. Co., 86 Fed. R. 528; Fairfield Floral Co. v. Bradbury, 87 Fed. R. 415. See Mandatory Injunctions, by Judge Jacob Klein, 12 Harv. Law Rev. 95.

§ 226. [1] Daniell's Ch. Pr. (2d Am. ed.) 1810; Eden on Injunctions, ch. xv.

be granted except at the time of the entry of the decree.[2] The setting up of outstanding terms can, it has been said, only be restrained by a perpetual injunction.[3] Mandatory injunctions also will very rarely be granted before a decree.[4] "It is a rule of practice in the Circuit Courts of the United States not to allow an injunction to stay an ejectment suit until it can be investigated in equity, unless a judgment be entered therein."[5]

§ 227. Distinction between common and special injunctions.— Injunctions were formerly of two kinds, common and special. Common injunctions were granted, as of course, upon the defendant's default either in appearing or answering, and were only applicable to restrain proceedings at common law.[1] Special injunctions were those granted, not as a matter of course, but upon the special circumstances of the case as disclosed by the answer of the defendant or upon affidavits.[2] Common injunctions, although recognized by the equity rules,[3] have been abolished by the Revised Statutes.[4] The learning upon the subject, which is very technical, seems now, therefore, useless, and will not be repeated here.[5]

§ 228. Time and place of applications for interlocutory injunctions.— An injunction may be obtained, at any time, as well in vacation as in term, and whether the court be sitting or not, at any place within which the judge granting it has jurisdiction, and at almost any stage of the cause.[1] In England it has been held, that, in a very extraordinary case, an injunction may be granted upon petition before the filing of a bill or the service of a subpœna.[2] In a court of the United States an injunction

[2] Daniell's Ch. Pr. (2d Am. ed.) 1903; Adams v. Crittenden, 17 Fed. R. 42.

[3] Hylton v. Morgan, 6 Ves. 293; Byrne v. Byrne, 2 Sch. & Lef. 537; Barney v. Luckett, 1 Sim. & S. 419; Northey v. Pearce, 1 Sim. & S. 420.

[4] Camblos v. Phila. & R. R. Co., 9 Phila. (Pa.) 411; s. c., 4 Brewst. (Pa.) 563; Rogers L. & M. Works v. Erie Ry. Co., 5 C. E. Green (N. J.), 379. But see Dinsmore v. L., C. & L. Ry. Co., 2 Fed. R. 465; Coe v. L. & N. R. Co., 3 Fed. R. 775, and other cases cited under § 225.

[5] Billings, J., in Heirs of Szywauski v. Zunts, 20 Fed. R. 861, 863, citing Turner v. Am. B. M. Union, 5 McLean, 344.

§ 227. [1] Daniell's Ch. Pr. (2d Am. ed.) 1877.

[2] Daniell's Ch. Pr. (2d Am. ed.) 1833.

[3] Rule 55.

[4] Perry v. Parker, 1 W. & M. 280; Lawrence v. Bowman, 1 McAll. 419.

[5] See Daniell's Ch. Pr. (2d Am. ed.) 1811–1833.

§ 228. [1] Daniell's Ch. Pr. (5th Am. ed.) 1663; Kerr on Injunctions, 543, 545; Bacon v. Jones, 4 Myl. & Cr. 433.

[2] Mayor of London v. Bolt, 5 Ves. 129.

has been issued[3] upon the filing of the bill and before service of the subpœna, and restraining orders are often granted.[4] It has been held that a non-resident defendant who cannot be served with process may be enjoined from infringing a patent within the district.[5] An injunction will ordinarily be refused while a demurrer or plea to the bill is pending.[6] But in cases of emergency, the court may order the sufficiency of such a pleading to be argued before the regular time for such a proceeding, together with the motion for the injunction;[7] or even grant a restraining order without waiting for the argument.[8] Should a motion be heard while a demurrer is on the file and undisposed of, it seems that upon the hearing of the motion the allegations in the bill will be considered as admitted.[9] An application for an injunction has been refused because the bill had been referred for scandal.[10]

§ 229. Injunctions not prayed for in the bill.— The English rule was that an injunction would not issue against a person not made a party to a bill specifically praying an injunction against him;[1] and the injunction had to be prayed for not only in the prayer for relief, but also in the prayer for process.[2] To this, however, there were four exceptional classes of cases. If the court had by its decree taken the distribution or control of property into its own hands, it would prevent injury thereto either by the parties litigant or others, although no injunction had been prayed by the bill.[3] Thus, in a foreclosure suit, it would restrain waste by the mortgagor after a decree for an account;[4] and after a decree for the administration of the assets of a dead man, it would enjoin a creditor not a party to the suit from proceeding at law against the testator's or intestate's estate to satisfy his individual claim, provided that the executor

[3] Schermerhorn v. L'Espenasse, 2 Dall. 360.

[4] *Cf.* U. S. R. S., § 718; *infra*, § 230.

[5] Kennedy v. Penn. I. & Coal Co., 67 Fed. R. 839.

[6] Cousins v. Smith, 13 Ves. 164; Ketchum v. Driggs, 6 McLean, 13; Anon., 2 Atk. 118; Daniell's Ch. Pr. (5th Am. ed.) 1671.

[7] Anon. v. Bridgewater C. Co., 9 Sim. 378; Daniell's Ch. Pr. (5th Am. ed.) 1671.

[8] Wardle v. Claxton, 9 Sim. 412; Maltby v. Bobo, 14 Blatchf. 53; Fremont v. Merced M. Co., 1 McAll. 267.

[9] Bayerque v. Cohen, McAll. 113.

[10] Davenport v. Davenport, 6 Madd. 251.

§ 229. [1] Daniell's Ch. Pr. (5th Am. ed.) 1614–1617.

[2] Wood v. Beadell, 3 Sim. 278.

[3] Daniell's Ch. Pr. (5th Am. ed.) 1614.

[4] Wright v. Atkyns, 1 V. & B. 313.

made an affidavit stating what assets he had in his hands, or had previously admitted their amount.[5] If the suit were brought by a legatee, such a statement or admission was not indispensable.[6] Secondly, an injunction was granted without a bill being filed, for the express purpose of preventing a plaintiff from suing both at law and in equity at the same time and for the same matter, and to compel him to make an election.[7] Thirdly, an injunction could always be obtained to compel respect and enforce obedience to the decrees and orders of the court. Thus, publications which were disrespectful to the court, or which unfairly reported its proceedings, could be enjoined.[8] So, too, an injunction could issue to restrain an action at law to recover damages for false imprisonment under process of contempt improperly issued;[9] to compel compliance with the terms and spirit of a decree by one who had bought land under it;[10] to compel compliance with his lease by the tenant of a receiver;[11] and to prevent an unauthorized action against a receiver.[12] And fourthly, there seems to be a class of cases not clearly defined in which the court granted an injunction, when without it "the whole object of the proceedings would be defeated," although it was not prayed for in the bill.[13]

§ 230. Special practice of the Federal courts in the issue of injunctions.— The following regulations control the practice in issuing injunctions in the Federal courts: "The prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief; and if an injunction, or a writ of *ne exeat regno*, or any other special order, pending the suit, is required, it shall also be specially asked for."[1] "Whenever an injunction is

[5] Daniell's Ch. Pr. (5th Am. ed.) 1617; Paxton v. Douglas, 8 Ves. 520; Thompson v. Brown, 4 J. Ch. (N. Y.) 619.

[6] Ratcliffe v. Winch, 16 Beav. 576; Daniell's Ch. Pr. (5th Am. ed.) 1617.

[7] Rogers v. Vosburgh, 4 J. Ch. (N. Y.) 84.

[8] Anon., 2 Ves. Sen. 520; Brook v. Evans, 29 L. J. Ch. 616; Coleman v. West H. Ry. Co., 8 W. R. 734; Mackett v. Com'rs of Herne Bay, 24 W. R. 845. But see U. S. R. S., § 725.

[9] Frowd v. Lawrence, 1 J. & W. 655; Ex parte Clarke, 1 R. & M. 563; Daniell's Ch. Pr. 511.

[10] Casamajor v. Strode, 1 Sim. & Stu. 381; Kerr on Injunctions, 543.

[11] Walton v. Johnson, 15 Sim. 352.

[12] Angel v. Smith, 9 Ves. 335.

[13] Blomfield v. Eyre, 8 Beav. 250. See Shainwald v. Lewis, 6 Fed. R. 766.

§ 230. [1] Equity Rule 21. But see Shainwald v. Lewis, 6 Fed. R. 766.

asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance, and plead, demur, or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled as of course, upon motion, without notice, to such injunction.[2] But special injunctions shall be grantable only upon due notice to the other party by the court in term, or by a judge thereof in vacation, after a hearing, which may be *ex parte* if the adverse party does not appear at the time and place ordered. In every case where an injunction — either the common injunction or a special injunction — is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some other order of the court."[3] "Whenever notice is given of a motion for an injunction out of a Circuit or District Court, the court or judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion; and such order may be granted with or without security, in the discretion of the court or judge."[4] "Writs of injunction may be granted by any justice of the Supreme Court in cases where they might be granted by the Supreme Court, and by any judge of a Circuit Court in cases where they might be granted by such court. But no justice of the Supreme Court shall hear or allow any application for an injunction or restraining order in any cause pending in the circuit to which he is allotted, elsewhere than within such circuit, or at such place outside of the same as the parties may stipulate in writing, except when it cannot be heard by the circuit judge of the circuit or the district judge of the district. And an injunction shall not be issued by a district judge, as one of the judges of a Circuit Court," except when holding such court,[5] "in any case where a party has had a reasonable time to apply to the Circuit Court for the writ; nor shall any injunction so issued by a district judge continue

[2] Perry v. Parker, 1 W. & M. 280.

[3] Equity Rule 55.

[4] U. S. R. S., § 718. See Yuengling v. Johnson, 1 Hughes, 607; C., B. & Q. Ry. Co. v. B., C. R. & N. Ry. Co., 34 Fed. R. 481; Payne v. Kansas & A. V. R. Co., 46 Fed. R. 546; State v. Wakeley, 28 Neb. 431, 437. Such a restraining order may be mandatory and require affirmative action. Pokegama S. R. L. Co. v. Klamath R. L. & I. Co., 86 Fed. R. 528.

[5] Goodyear D. V. Co. v. Folsom, 8 Fed. R. 509.

longer than to the Circuit Court next ensuing, unless so ordered by the Circuit Court."[6] It has been held under the foregoing statutory provision that absence or illness of the circuit and district judges is such a disability as authorizes the circuit justice to hear and grant the application at a place outside of the circuit;[7] and that, if the circuit justice as well as the circuit and district judges be absent from the circuit, the application may be heard and the writ granted by any justice of the Supreme Court in any part of the United States.[8] A denial by the Circuit Court of an application to dissolve an injunction granted by a district judge may be treated as an order for its continuance.[9] But if no order continuing it is made, such an injunction is dissolved without an order.[10]

"Where, upon a hearing in equity in a District Court or in a Circuit Court, or by a judge thereof in vacation, an injunction shall be granted or continued, or a receiver appointed by an interlocutory order or decree in a case in which an appeal from a final decree may be taken under the provisions of this act to the Circuit Court of Appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction, or appointing such receiver, to the Circuit Court of Appeals: Provided, that the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed, unless otherwise ordered by that court during the pendency of such appeal: provided, further, that the court below may in its discretion require, as a condition of the appeal, an additional bond."[11]

"Any injunction that may be granted upon hearing after notice to the defendant by any Circuit Court of the United States, or by a judge thereof, restraining and enjoining the

[6] U. S. R. S., § 719. See Dudley's Case, 1 Pa. L. J. 302.

[7] Searles v. Jacksonville, P. & M. R. Co., 2 Woods, 621.

[8] U. S. v. Louisville & P. C. Co., 4 Dill. 600.

[9] Parker v. Judges of Circuit Court, 12 Wheat. 561. See Gray v. C., I. & N. R. Co., 1 Woolw. 63. This is so even where the court is held by a district judge. Industrial & M. G. T. Co. v. Electrical S. Co., 58 Fed. R. 732.

[10] Parker v. Judges of Circuit Court, 12 Wheat. 561; Gray v. C., I. & N. R. Co., 1 Woolw. 63.

[11] 28 St. at L. 666, as amended by 31 St. at L. 660.

performance or representation of any such dramatic or musical composition, may be served on the parties against whom such injunction may be granted anywhere in the United States, and shall be operative and may be enforced by proceedings to punish for contempt or otherwise by any other Circuit Court or judge in the United States; but the defendants in said action, or any or either of them, may make a motion in any other circuit in which he or they may be engaged in performing or representing said dramatic or musical composition to dissolve or set aside the said injunction upon such reasonable notice to the plaintiff as the Circuit Court or the judge before whom said motion shall be made shall deem proper; service of said motion to be made on the plaintiff in person or on his attorneys in the action. The Circuit Court or judges thereof shall have jurisdiction to enforce said injunction and to hear and determine a motion to dissolve the same, as herein provided, as fully as if the action were pending or brought in the circuit in which said motion is made.

"The clerk of the court, or judge granting the injunction, shall, when required to do so by the court hearing the application to dissolve or enforce said injunction, transmit without delay to said court a certified copy of all the papers on which the said injunction was granted that are on file in his office." [12]

[12] 29 St. at L. 481.

In the Circuit Court for the Southern District of New York the rules provide as follows: —

"105. No motion for an injunction (except to stay waste) shall be heard unless a copy of the bill and of the depositions to be offered in its support shall be served on the adverse party, or his attorney, at least four days before motion made."

"106. The defendant may show cause against the allowance of an injunction, either by plea, answer, or demurrer to the bill, or by parol exception to its legal sufficiency, or by deposition, disproving the equity on which the motion is founded."

"107. Suppletory, or supporting, proofs may, at the discretion of the court, or judge, be offered by the complainant to rebut the cause shown by the defendant; but the reception of such additional proofs is not to permit the introduction of further proofs in opposition thereto by the defendant, previous to the final hearing upon the merits."

"Rule of May 18, 1846. "Hereafter, on motions for an injunction, because of the infringement of a patent right, the complainant shall not be permitted to give evidence to rebut the cause shown by the defendant against the allowance thereof, other than to a denial that the defendant uses the discovery or invention claimed by the complainant, or to a claim by the defendant that he acts under an assignment or license from the patentee, and on motions for injunctions to stay

§ 231. Notice of application for interlocutory injunction. As a general rule, notice of an application for an injunction must always be given to the person against whom the injunction is desired; but in very pressing cases, where the mischief sought to be prevented was serious, imminent, and irremediable, or where the mere act of giving notice to the defendant of the intention to make the application might have been of itself productive of the mischief apprehended, by inducing him to accelerate the act in order that it might be complete before the time for making the application should have arrived, the courts have always awarded injunctions without notice.[1] On an application for an injunction without notice, the plaintiff should state in his affidavit the time when he first learned of the threatened mischief,[2] if the injunction desired be to restrain the infringement of a patent that he believes that the person to whom the patent was issued was the original inventor thereof, or that the thing or process patented was new or had not been introduced into public use in the United States for more than two years prior to the application upon which the patent was issued,[3] and every material circumstance connected with the case, whether the same bears for or against his application.[4] If his affidavit be defective in any of these particulars, according to the English practice, an injunction would not be issued, or if issued the order for it would be discharged.[5] In the ab-

waste, only to a defense set up justifying the waste; and in neither case shall such suppletory or supporting proofs be received, unless the court, or one of the judges, on satisfactory cause shown, shall, by order previously made, allow the same to be given. And so much of rule 107 of the standing Rules in Equity of this court adopted April 28, 1838, as may be inconsistent herewith, is repealed. Motions for injunctions shall be brought on by the complainant on the day named in the notice, if the court is then in session; and in default thereof, the defendant may move that the notice be discharged for the term, with costs, unless further time is given, or the hearing is delayed by order of the court."

§ 231. [1] Daniell's Ch. Pr. (5th Am. ed.) 1664; Kerr on Inj. 545; Wing v. Fairhaven, 8 Cush. (Mass.) 363; Schermerhorn v. L'Espenasse, 2 Dall. 360; Yuengling v. Johnson, 1 Hughes, 607.

[2] Calvert v. Gray, 2 Cooper's Ch. 171, n.

[3] Hill v. Thompson, 8 Meriv. 622; Sturz v. De la Rue, 5 Russ. 322, 329; Sullivan v. Redfield, 1 Paine, 441. See also U. S. R. S., §§ 4886, 4887.

[4] Dalglish v. Jarvie, 2 Macn. & G. 231.

[5] Dalglish v. Jarvie, 2 Macn. & G. 231, 243, 244, per Baron Rolfe: "The application for a special injunction is very much governed upon the same principles which govern insurances, matters which are said to require the utmost degree of good

sence of any local rule upon the subject, the practice in giving notice of an application for an injunction, and of proceeding at the time when the application is made, are the same when an injunction is asked for as upon any other interlocutory application. It has been said that an application for an interlocutory special injunction, during term and after the beginning of a suit and before answer, can only be made by motion; but that in vacation a judge may grant such an application upon petition.[6] The usual practice is, however, to apply by motion. It has been held that a mandatory injunction can only be granted upon notice.[7] It has been further held that the evidence which would prevent the issue of an interlocutory injunction will be sufficient to induce the court to dissolve one previously granted.[8]

§ 232. Affidavits upon an application for an injunction.— The affidavits upon which an injunction is sought are usually sworn to by the plaintiffs or one of them,[1] but may be sworn to by any person acquainted with the facts,[2] in which latter case the affidavit should, it seems, state a good reason for its not being sworn to by one of the plaintiffs.[3] Except in extraordinary cases, the allegations must be sworn to positively and not upon information and belief, unless the sources of the in-

faith, '*uberrima fides.*' In cases of insurance a party is required not only to state all matters within his knowledge, which he believes to be material to the question of the insurance, but all which in point of fact are so. If he conceals anything that he knows to be material, it is a fraud; but besides that, if he conceals anything that may influence the rate of premium which the underwriter may require, although he does not know that it would have that effect, such concealment entirely vitiates the policy. So here, if the party applying for a special injunction abstains from stating facts which the court thinks are most material to enable it to form its judgment, he disentitles himself to that relief which he asks the court to grant."

[6] Daniell's Ch. Pr. (5th Am. ed.) 1666; Smith v. Clarke, 2 Dick. 455; Nichols v. Kearsly, 2 Dick. 645.

[7] Chicago, B. & Q. R. Co. v. Burlington, C. R. & N. R. Co., 34 Fed. R. 481.

[8] Cary v. Domestic S. Co., 26 Fed. R. 38. *Contra*, Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co., 54 Fed. R. 730; s. c., 54 Fed. R. 746; *supra*, § 225.

§ 232. [1] Daniell's Ch. Pr. (5th Am. ed.) 1669.

[2] Lord Byron v. Johnston, 2 Meriv. 29; Brooks & Hardy v. O'Hara Bros., 8 Fed. R. 529.

[3] Lord Byron v. Johnston, 2 Meriv. 29; Spaulding v. Keely, 7 Sim. 377; Scotson v. Gaury, 1 Hare, 99; Kerr on Inj. 548.

formation are stated and some excuse given for the absence of the affidavit of the informant.[4] It is in general necessary that a plaintiff should swear positively to his title.[5] An injunction has been refused when a plaintiff merely swore upon information and belief that he was a remainderman under a settlement.[6] Upon an application for an injunction to stay waste, he must set out his title with particularity. A statement "that the plaintiff was entitled to the fee simple of the estate" has been held insufficient.[7] It has been said that if fraud is relied upon as a basis for an injunction, it must be sworn to positively, and not merely upon information and belief.[8] The plaintiff should also in the affidavits show some actual violation of his rights, or a sufficient ground to apprehend it.[9] An injunction may be granted though the bill is not sworn to, provided that the accompanying affidavits show a proper case for it;[10] but not unless a proper case is made out by the bill itself.[11] If the defendant in his opposing affidavits set up as a defense new matter in avoidance of the case shown by the plaintiff, the latter may have leave to file further affidavits in rebuttal; but generally no subsequent affidavits can be filed by the defendant.[12] Rebutting affidavits may also be used to support any allegations of the bill denied in the answer except such as state the plaintiff's title to property affected by the litigation.[13] The authorities are conflicting as to whether or not the plaintiff's title, if denied in the answer, can be supported

[4] Lake S. & N. Ry. Co. v. Felton (C. C. A.), 103 Fed. R. 227; Murphy v. Jack, 142 N. Y. 215, 218; Rosevelt v. Edson, 51 N. Y. Super. Ct. 227. In Re Debs, 158 U. S. 564, 573, the bill filed by a railroad company was verified only by the affidavit of a person not shown to be connected with it, stating that he had read the bill and believed the statements therein contained to be true.

[5] Daniell's Ch. Pr. (5th Am. ed.) 1669.

[6] Davis v. Leo, 6 Ves. 784.

[7] Whitelegg v. Whitelegg, 1 Brown, Ch. C. 57.

[8] Brooks & Hardy v. O'Hara Bros., 8 Fed. R. 529.

[9] Gibson v. Smith, 2 Atk. 182; Jackson v. Cator, 5 Ves. 688; Hanson v. Gardiner, 7 Ves. 305.

[10] Smith v. Schwed, 6 Fed. R. 455.

[11] Cooper v. Mattheys, 8 Law R. 413; Wilson v. Stolley, 4 McLean, 272; Leo v. Union Pac. Ry. Co., 17 Fed. R. 273; Land Co. v. Elkins, 20 Fed. R. 545; St. Louis T. F. v. Carter & G. P. Co., 31 Fed. R. 524.

[12] Day v. New Eng. C. S. Co., 3 Blatchf. 154. See Rule 107 and Rule of May, 1846, of U. S. C. C., S. D. N. Y., quoted *supra*, § 230.

[13] Brooks v. Bicknell, 3 McLean, 250; Farmer v. Calvert Lith. Co., 1 Flip. 228. See Rule 113 and Rule of May, 1846, of U. S. C. C., S. D. N. Y.

by rebutting affidavits.[14] Where an allegation in the bill is not denied in the answer, it is taken as admitted for the purposes of a motion for a preliminary injunction.[15] Documentary proof, if of equal force with affidavits, can also be used in support or in opposition to a motion for an injunction.[16] Upon the hearing of a motion for a preliminary injunction, the rules of evidence are applied less strictly than upon the final hearing of the cause; and consequently decrees entered in suits between strangers affecting the validity of a patent in question may be offered in evidence, in support of an application for a preliminary injunction, but not in support of an application for one that is to be perpetual.[17] Hearsay evidence may also be used.[18] In one case statements in a proclamation by the Governor of the State were treated as evidence upon such a motion.[19] In another, campaign speeches by the Governor of the State were treated as evidence of the proper construction of a law.[20]

§ 233. Rules of decision upon applications for interlocutory injunctions.— The issue of an interlocutory injunction is never a matter of right, but rests in the sound discretion of the court. In order to obtain one, the plaintiff must show either that there is no doubt of the wrongful nature of the act sought to be enjoined,[1] or that his own claims of right have been acquiesced in without question for a long period of time,[2] or that the injury which will result to himself from a refusal of the injunction will be very great, and that to the defendant from the issue thereof very slight.[3] Otherwise, an interlocutory in-

[14] Compare Poor v. Carleton, 3 Sumn. 70; Goodyear v. Mullee, 3 Fisher, 420, with Farmer v. Calvert Lith. Co., 1 Flipp. 228; Parker v. Sears, 1 Fish. Pat. Cas. 93; U. S. v. Parrott, 1 McAll. 271. See Rule 107 and Rule of May, 1846, of U. S. C. C., S. D. N. Y.

[15] Young v. Grundy, 6 Cranch, 51. See § 146.

[16] Schermerhorn v. L'Espenasse, 2 Dall. 360.

[17] Buck v. Hermance, 1 Blatchf. 322; Matthews v. Ironclad Mfg. Co., 19 Fed. R. 321.

[18] Casey v. Cincinnati Typ. Union No. 3, 45 Fed. R. 135, 147, where Judge Sage quotes this passage with approval.

[19] Coeur d' Alene Cons. & M. Co. v. Miners' Union, 51 Fed. R. 260.

[20] Mercantile Tr. Co. v. Texas & P. Ry. Co., 51 Fed. R. 529, 542.

§ 233. [1] Minturn v. Larue, 1 McAll. 370; Buchanan v. Howland, 2 Fish. 341; Doughty v. West, 2 Fish. 553.

[2] Varick v. Mayor of N. Y., 4 J. Ch. (N. Y.) 53; Kirby Bung Mfg. Co. v. White, 1 Fed. R. 604; McKay v. Dibert, 5 Fed. R. 587; W. U. Tel. Co. v. Union Pac. R. Co., 3 Fed. R. 721; Atlantic & Pac. Tel. Co. v. Union Pac. Ry. Co., 1 Fed. R. 745.

[3] W. U. Tel. Co. v. St. J. & W. Ry.

junction will be denied him.[4] In a suit under the act to protect trade and commerce against unlawful monopolies, a preliminary injunction was refused when doubtful questions of law and fact were involved, partly upon the ground that as the United States tendered no bond, more injury would result to the defendant from the issue than to the plaintiff from the refusal of the writ.[5] A preliminary injunction to restrain the infringement of a patent will nearly always be refused, if the defendant has ample pecuniary responsibility, or gives security against loss to the plaintiff, and is willing to keep an account of his manufacture, use, and sale of the article claimed to be patented, and the damages which the plaintiff will suffer can be readily reckoned in money.[6] Danger of inconvenience to the public is a ground for refusing a preliminary injunction.[7] A preliminary injunction may also be refused when the plaintiff has been guilty of laches in applying for it; even though his delay has not been such as to disentitle him to a perpetual injunction after the hearing.[8] If an injunction has been obtained

Co., 8 Fed. R. 430; W. U. Tel. Co. v. Burlington & S. W. Ry. Co., 11 Fed. R. 1; Am. U. Tel. Co. v. Union Pac. Ry. Co., 1 McCrary, 188; Atlantic & Pac. Tel. Co. v. Union Pac. Ry. Co., 1 McCrary, 541; Allison v. Corson (C. C. A.), 88 Fed. R. 581; Dimick v. Shaw (C. C. A.), 94 Fed. R. 266; Indianapolis Gas Co. v. Indianapolis, 82 Fed. R. 245, 246, per Baker, J.: "It is settled that upon a preliminary application for a temporary restraining order all that the judge should, as a general rule, require is a case of probable right, and of probable danger to that right without the interference of the court, and its discretion should then be regulated by the balance of inconvenience or injury to the one party or the other." Citing New Memphis G. & L. Co. v. Memphis, 72 Fed. R. 952.

[4] Coffeen v. Brunton, 5 McLean, 256; Smith v. Cummings, 1 Fish. Pat. Cas. 152; French v. Brewer, 3 Wall. Jr. 346; Pentlarge v. Beeston, 1 Fed. R. 862; Kirby Bung Mfg. Co. v. White, 1 Fed. R. 604; Texas & Pac. Ry. Co. v. Interstate Tr. Co., 45 Fed. R. 5. An injunction was granted against an illegal ordinance regulating water rents for one year, although an appeal from the order could not be determined before the end of the year. Los Angeles C. W. Co. v. Los Angeles, 88 Fed. R. 720.

[5] U. S. v. Jellico M. C. & C. Co., 43 Fed. R. 898.

[6] Foster v. Moore, 1 Curt. 279; Morris v. Shelbourne, 8 Blatchf. 266; Gilbert & B. Mfg. Co. v. Bussing, 12 Blatchf. 426; Swift v. Jenks, 19 Fed. R. 641; Hoe v. Boston D. Adv. Co., 14 Fed. R. 914; U. S. Annunciator Co. v. Sanderson, 3 Blatchf. 184. But see Gibson v. Van Dresar, 1 Blatchf. 532; Tracy v. Torrey, 2 Blatchf. 275; Park hurst v. Kinsman, 2 Blatchf. 78; McWilliams Mfg. Co. v. Blundell, 11 Fed. R. 419. The rules of decision upon motions for injunctions in patent suits are explained in § 217, *supra*.

[7] Southwestern B. El. L. & P. Co. v. Louisiana El. L. Co., 45 Fed. R. 893; *supra*, § 216.

[8] Gordon v. Cheltenham Ry. Co., 5

by an interlocutory order, and it is desired to continue it provisionally after a hearing, a direction to that effect should be inserted in the interlocutory decree then entered.[9] Upon the assignment of a motion for an injunction the defendant can raise any defense to the substance of the bill that would be set up by a demurrer.[10]

§ 234. The writ of injunction.— Immediately upon the entry of an order for an injunction, the party who obtained it is entitled to have the writ issued from the clerk's office and served.[1] He should attend to this within a reasonable time. Where the writ was tested six weeks after the entry of the order granting it and was not served till nearly a year afterwards, the court refused to punish the defendant for disobedience, saying that, after the lapse of so much time, the plaintiff should have applied for leave to use the writ.[2] Like all other writs and processes issuing from the courts of the United States, writs of injunction must be under the seal of the court from which they issue, and signed by the clerk thereof. Those issuing from the Supreme Court or a Circuit Court must bear teste, from the date of such issue, of the Chief Justice of the United States, or, when that office is vacant, of the associate justice next in precedence, and those issuing from a District Court must bear teste of the judge, or, when that office is vacant, of the clerk thereof.[3] "The orders pronounced by the court in cases of special injunctions before answer, have varied at different periods. The form most frequently adopted enjoined the party '*till further order.*' In some cases the injunction has been till '*appearance* and further order;' in others till '*answer* and further order.' But the form at present used, and which is established by a rule laid down by Lord Eldon, is 'till answer *or* further order.' This has been adopted as giving defendant the liberty to move, if necessary, to dissolve upon affidavit, before he has answered the bill."[4] The

Beav. 229; Mundy v. Kendall, 23 Fed. R. 591; Kerr on Inj. 22, 23.

[9] Daniell's Ch. Pr. (2d Am. ed.) 1902; Gardner v. Gardner, 87 N. Y. 14.

[10] Ladd v. Oxnard, 75 Fed. R. 703.

§ 234. [1] Daniell's Ch. Pr. (2d Am. ed.) 1816, 1817, 1964.

[2] McCormick v. Jerome, 3 Blatchf. 486.

[3] U. S. R. S., §§ 911, 912.

[4] Daniell's Ch. Pr. (2d Am. ed.) 1895; Read v. Consequa, 4 Wash. 174. See Bolton v. London School Board, 7 Ch. D. 766, 771; Gardner v. Gardner, 87 N. Y. 14; State v. Wakeley, 28 Neb. 431, 437.

writ should contain a concise description of the particular acts or things in respect to which the defendant is enjoined;[5] and should conform to the directions of the order granting the injunction.[6] If, however, the writ is broader than the order warrants, the defendant should apply to the court for an order setting it aside or modifying it.[7] It seems that he is not justified in disobeying it and raising the objection when a motion is made for an attachment against him.[8] It seems that a writ is insufficient which designates the acts sought to be enjoined by a reference to the bill without describing them.[9] The English practice was to mention in the writ a money penalty to be incurred by the defendant if he disobeyed it; but that does not seem to be necessary here.[10] The writ should be addressed to the persons whom it is desired to enjoin.[11] If the injunction is against waste, or forbids the continuance of a nuisance, or some other similarly inequitable act, it is usually addressed to the defendant, his servants, workmen, and agents;[12] if to re-

[5] Whipple v. Hutchinson, 4 Blatchf. 190.

[6] Sickles v. Borden, 4 Blatchf. 14.

[7] Ibid.

[8] Ibid.

[9] Whipple v. Hutchinson, 4 Blatchf. 190; Sullivan v. Judah, 4 Paige (N. Y.), 444.

[10] Low v. Hauel, 1 Wall. Jr. 845.

[11] Daniell's Ch. Pr. (2d Am. ed.) 1817.

[12] Kerr on Injunctions, 559; Daniell's Ch. Pr. (5th Am. ed.) 1673; Humphreys v. Roberts, Seton's Decrees (4th ed.), 173; In re Lennon, 166 U. S. 548. In Dadirrian v. Gullian, 79 Fed. R. 784, per Kirkpatrick, D. J.: "The writ is directed specifically to the defendants in the suit, and then generally, without naming them, to their servants, agents, and employees. The object of this generalization is to prevent the defendants from doing by others that which the court has forbidden them to do personally; from accomplishing indirectly a result prohibited by the court. The full effect of the order is that the defendant shall not do the unlawful act himself, neither shall his agent, servant, or employee do it for him, nor shall the defendant do it as the agent, servant or employee of another. Potter v. Muller, 1 Bond, 601, Fed. Cas. No. 11,333. There is no restraint laid upon the agent, servant, or employee personally, but merely as the agent, servant, or employee of the enjoined defendant. Slater v. Merritt, 75 N. Y. 268; Wellesley v. Mornington, 11 Beav. 181. Notwithstanding the injunction and notice of it, he, upon ceasing to be the agent, servant, or employee of the defendant, is free to act for himself in the protection of his own rights and the prosecution of his own interests, even though it involve his doing the very thing prohibited his former master. Mexican Ore Co. v. Mexican G. M. Co., 47 Fed. R. 351. He may avoid obedience to a mandatory injunction by actually ceasing to be an employee of the company (Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co., 54 Fed. R. 746); and he may enter the service of another master, a stranger to the suit, and be as free as he from obligation to obey the

strain proceedings in another court, to the defendant, his attorneys, and agents,[13] even though the bill prays for an injunction against the defendant alone. But the latter's tenants cannot be thus enjoined, unless they have become such after the commencement of the suit or have been made parties to it.[14] In one case an injunction was granted against all persons acting in concert with the defendants named and under their direction and control.[15] The writ should be indorsed or subscribed with the name and office address of the plaintiff's solicitor, or with the name and residence of the plaintiff if he appears in person.[16]

§ 235. Dissolution and modification of interlocutory injunctions.— The common injunction was dissolved as of course upon the defendant's putting in a sufficient answer to the bill. The practice in such a case was for him to obtain an order *nisi*, upon the return of which the injunction was always dissolved, unless the plaintiff could show that the answer was insufficient for the purpose either of defense or of discovery.[1] A special injunction can only be dissolved by a special motion, either in open court or at a special hearing appointed elsewhere for that purpose by a judge of the court.[2] The motion may be made at any time before decree,[3] even, it seems, before the defendant has been served with process,[4] and before he has appeared.[5] When a special injunction has been granted against several defendants, any of them may move to dissolve it as against himself; but he should in that case serve the others as well as the plaintiff with a notice of his motion.[6] In one case after answer, a notice left at the office of the solicitor for the plaintiff during his absence from the city three days before the

court's decree. People v. Randall, 73 N. Y. 416; Slater v. Merritt, 75 N. Y. 268."

[13] Daniell's Ch. Pr. (5th Am. ed.) 1678.

[14] Hudson v. Coppard, 29 Beav. 4; Kerr on Inj. 543.

[15] U. S. v. Elliott, 64 Fed. R. 27, 35.

[16] Kerr on Inj. 559; Daniell's Ch. Pr. (5th Am. ed.) 1674.

§ 235. [1] Daniell's Ch. Pr. (2d Am. ed.) 1820–1829; Poor v. Carleton, 3 Sumn. 70; New York v. Connecticut, 4 Dall. 1, 3, note 1, per Washington, J.

[2] Kerr on Inj. 561; Daniell's Ch. Pr. 1675; Wilkins v. Jordan, 3 Wash. C. C. 226; Caldwell v. Walters, 4 Cranch, C. C. 577.

[3] Kerr on Inj. 560; Daniell's Ch. Pr. (5th Am. ed.) 1675; Met. G. & S. Exch. v. Chicago B. of T., 15 Fed. R. 847.

[4] Shields v. McClung, 6 W. Va. 79.

[5] Menzies v. Rodrigues, 1 Price, 92.

[6] Thompson v. Geary, 5 Beav. 131; Kerr on Inj. 564. But see Daniell's Ch. Pr. (5th Am. ed.) 1676, note 1.

motion was held sufficient.[7] If the motion to dissolve is made before answer, it must be supported by affidavits or documentary proof contradicting the statements upon which the injunction was obtained,[8] unless the defendant can show that it is plain upon the face of the plaintiff's bill and affidavits that he was not entitled to the injunction, when the motion will be granted.[9] When the injunction has been irregularly issued, the defendant should move to discharge the order granting it.[10] If he should move to dissolve it, he might be held to have by so doing recognized its regularity.[11] It has been held that after a demurrer put in by him to the bill has been overruled a defendant can only move to dissolve by leave of the court; which was, in one case, only granted upon his affidavit that the demurrer was not interposed for delay, and his giving security to pay all damage to the plaintiff thereby caused.[12] Where the application for dissolution was made after answer, it was originally thought that the plaintiff could not show that any of the allegations therein contained were false;[13] but that doctrine has been, in this country at least, exploded,[14] and it is well settled that the plaintiff can not only dispute the truth of such allegations, whether they are positive or negative, but is at liberty to file counter affidavits in reply to new matter contained in the defendant's affidavits or answer.[15] When a stay-order has been made, and simultaneous applications, by the defendant to discharge the stay-order, and by the plaintiff for an injunction, are heard together, the plaintiff has the right to open and close the argument.[16] If upon the application to dis-

[7] Caldwell v. Walters, 4 Cranch, C. C. 577.

[8] Daniell's Ch. Pr. (5th Am. ed.) 1676; Young v. Grundy, 6 Cranch, 51.

[9] Hudson v. Maddison, 12 Sim. 416; Kidwell v. Masterson, 3 Cranch, C. C. 52; Fenwick Hall Co. v. Town of Old Saybrook, 66 Fed. R. 389.

[10] Angier v. May, 3 W. R. 330; Daniell's Ch. Pr. (5th Am. ed.) 1676; Kerr on Inj. 564.

[11] Vipan v. Mortlock, 2 Meriv. 476; Kerr on Inj. 564.

[12] Woodworth v. Edwards, 3 W. & M. 120.

[13] Daniell's Ch. Pr. (5th Am. ed.) 1676, note 4.

[14] Poor v. Carleton, 3 Sumn. 70; U. S. v. Parrott, 1 McAll. 271; Orr v. Littlefield, 1 W. & M. 13; Orr v. Merrill, 1 W. & M. 376; Clum v. Brewer, 2 Curt. 506.

[15] Day v. New Eng. C. S. Co., 3 Blatchf. 154; Daniell's Ch. Pr. (5th Am. ed.) 1676; Shoemaker v. Nat. Mech. Bank, 1 Hughes, 101.

[16] Fraser v. Whalley, 2 Hem. & M. 10.

solve an injunction the court is not satisfied that the plaintiff is entitled to retain it, it will dissolve the injunction, and may then direct an issue, an action at law, or a reference before the hearing.[17] If, however, it is satisfied that the plaintiff is entitled to the writ, the court will direct the injunction to be continued until the hearing.[18] Where the court dissolves the injunction upon the ground that it appears upon the face of the bill that the plaintiff is not entitled thereto, and that is the only relief prayed for by him, it cannot at the same time dismiss the bill; for the plaintiff has still the right to bring the suit to a hearing.[19] If the question is left in doubt upon the motion to dissolve, it seems that the motion will be denied.[20] The ambiguity of the order granting the injunction is sufficient ground for its dissolution or modification.[21] The defendant's delay in moving to dissolve the injunction may deprive him of his right to have it dissolved.[22] When a special injunction has been granted after a full hearing, it will not be dissolved except on new evidence.[23] It has been held that a preliminary injunction will not be dissolved after answer upon grounds shown by affidavits, which, from their not having been set up in the answer, cannot be used at the hearing of the whole case.[24] A judge will very rarely dissolve an injunction granted by one of his judicial brethren.[25] A temporary injunction may be modified or dissolved by a Circuit Court after it has been

[17] Daniell's Ch. Pr. (2d Am. ed.) 1897.

[18] Packington v. Packington, 1 Dick. 101; Daniell's Ch. Pr. (5th Am. ed.) 1678.

[19] Brooke v. Clarke, 1 Swanst. 550; Blow v. Taylor, 4 Hen. & Munf. (Va.) 159.

[20] Cooper v. Mattheys, 5 Penn. L. J. 38; s. c., Law R. 413; Fisher v. Lord, 6 West L. J. 137; Woodworth v. Hall, 1 W. & M. 389; Woodworth v. Rogers, 3 W. & M. 135; Sparkman v. Higgins, 1 Blatchf. 205. But see Edison El. L. Co. v. Westinghouse El. & Mfg. Co., 54 Fed. R. 504.

[21] Dalglish v. Jarvie, 2 Macn. & G. 231.

[22] Florence S. M. Co. v. Grover & Baker S. M. Co., 110 Mass. 1; Kerr on Inj. 565; Antisdel v. Chicago H. C. Co., 89 Fed. R. 308, 311.

[23] Woodworth v. Hall, 1 W. & M. 389.

[24] Union P. B. M. Co. v. Newell, 11 Blatchf. 549.

[25] Cole S. Min. Co. v. Virginia & G. H. W. Co., 1 Saw. 685; Preston v. Walsh, 10 Fed. R. 315; Reynolds v. Iron S. Min. Co., 33 Fed. R. 354; Klein v. Fleetford, 35 Fed. R. 98. It has been said that, in case of the death of the judge who made the order, the motion to dissolve it should be made before two judges. Westerly Waterworks v. Town of Westerly, 77 Fed. R. 783.

affirmed upon appeal.[26] After an injunction has been dissolved, if evidence subsequently taken shows that it was properly issued, it may be issued anew.[27] The dissolution of an *ex parte* injunction on account of a suppression of material facts does not preclude the plaintiff from applying for another injunction on the merits.[28]

An injunction may also be dissolved if the plaintiff is guilty of gross and inexcusable delay in taking testimony or in bringing the cause to a hearing;[29] and in general if from a change of circumstances its continuance would no longer serve any useful purpose.[30] The subsequent passage of an act of Congress legalizing a structure which has been enjoined as a nuisance is a reason for the dissolution of an injunction.[31] It has been held that an injunction staying proceedings at law against a bankrupt is dissolved *ipso facto* by his discharge;[32] but remains unaffected by his delay in applying for his discharge.[33] It has been held that at the expiration of a patent the court will dissolve an injunction against its infringement, and leave the complainant no remedy except his claim for damages against the subsequent sale and use of articles manufactured while the patent was alive in infringement of the patent.[34] An injunc-

[26] Edison El. L. Co. v. U. S. El. L. Co. (C. C. A.), 59 Fed. R. 501; Andrews v. National F. & P. Works, 61 Fed. R. 782, 790; s. c., 10 C. C. A. 60, 68; s. c., 24 U. S. App. 81. *Cf.* Standard El. Co. v. Crane El. Co. (C. C. A.), 76 Fed. R. 767, 794. It has been said that a Circuit Court has no power to modify or dissolve a perpetual injunction contained in an interlocutory decree which has been affirmed upon appeal. Bissell C. S. Co. v. Goshen S. Co., 72 Fed. R. 545. It is the safer practice for the defendant to obtain a clause in the order of affirmance granting leave to the Circuit Court to modify the injunction order. Hadden v. Dooley (C. C. A.), 74 Fed. R. 429.

[27] Tucker v. Carpenter, Hempst. 440.

[28] Fitch v. Rochfort, 18 L. J. Ch. 458; Kerr on Inj. 564.

[29] Read v. Consequa, 4 Wash. C. C. 174; Bradley v. Reed, 12 Pitts L. J. 65; Schermerhorn v. L'Espenasse, 2 Dall. 360; In the Matter of Schwarz, 14 Fed. R. 787.

[30] In re Jackson, 9 Fed. R. 493; Re Pitts, 9 Fed. R. 542.

[31] Baird v. Shore L. Ry. Co., 6 Blatchf. 461; Hadden v. Dooley (C. C. A.), 74 Fed. R. 429. It has been said that a modification of the order will usually be refused when its effect would be to change the position of the property affected by the suit. Ulman v. Ritter, 72 Fed. R. 1000.

[32] In re Thomas, 3 N. B. R. 7.

[33] In re Schwarz, 14 Fed. R. 787, 789.

[34] Westinghouse v. Carpenter, 43 Fed. R. 894, Miller and Love, JJ.; Am. C. Ry. Co. v. Chicago C. Ry. Co., 41 Fed. R. 522. But see Am. D. R. B. Co. v. Rutland M. Co., 2 Fed. R. 356; *supra*, §§ 11, 216.

tion is not dissolved by an amendment of the bill,[35] unless the amendment substantially changes the cause of action,[36] or abandons the prayer for the injunction.[37] But it is customary to include in the order allowing an amendment a direction that it be "without prejudice to the injunction." The allowance of a demurrer to the whole bill puts an end to an injunction which had previously been obtained;[38] but leave will usually be given to amend without prejudice to the injunction, when the demurrer is allowed on account of a defect in form,[39] such as multifariousness.[40] "The allowance of a plea does not dissolve an injunction. There may be some equity shown to continue it. An order for its dissolution must be obtained."[41] An injunction is not dissolved by an abatement or by a defect in the suit, but the defendant must, if he wishes to be freed from the restraint thereby imposed, move that the plaintiff or his representatives be required to revive or take such other steps as may be necessary within a limited time, and that if he fail to do so the injunction may be dissolved.[42]

§ 236. The imposition of terms upon the issue, denial, dissolution, or continuance of an injunction.— As the issue of a special injunction is in its discretion, the court may impose terms upon the plaintiff or defendant when granting or refusing the issue, dissolution, or continuance of the same.[1] The usual terms are the giving of a bond or undertaking with good security to indemnify the other party against all loss that may result from the issue or withholding of the injunction.[2] These undertakings were invented by Vice-Chancellor Knight Bruce, and originally they were acquired only upon *ex parte* injunc-

[35] Reed v. Consequa, 4 Wash. C. C. 174; Warburton v. L. & B. Ry. Co., 2 Beav. 253. But see Sharp v. Ashton, 8 V. & B. 144.

[36] Atty. Gen. v. Marsh, 16 Sim. 572; Kerr on Inj. 566.

[37] Westcott v. Mulvane, 58 Fed. R. 805.

[38] Schneider v. Lizardi, 9 Beav. 461, 468; Kerr on Inj. 565.

[39] Rawlings v. Lambert, 1 J. & H. 458; Kerr on Inj. 565, 566; Lehigh Z. & I. Co. v. N. J. Z. & I. Co., 43 Fed. R. 545, 550.

[40] Lehigh Z. & I. Co. v. N. J. Z. & I. Co., 43 Fed. R. 545, 550.

[41] Kerr on Inj. 566; Philips v. Langhorn, Dick. 148; Ferrand v. Hamer, 4 M. & C. 143.

[42] Chowick v. Dimes, 3 Beav. 200; Lee v. Lee, 1 Hare, 622; Chester v. Life Ass'n of Am., 4 Fed. R. 487.

§ 237. [1] Russell v. Farley, 105 U. S. 433.

[2] Russell v. Farley, 105 U. S. 433; Kirby Bung Mfg. Co. v. White, 1 Fed. R. 604; Northern Pac. R. Co. v. St. P., M. & M. R. Co., 2 McCrary, 260; s. c., 4 Fed. R. 688.

tions, being designed to protect the court as well as the defendant from improper *ex parte* applications. Later the practice was extended to interlocutory injunctions granted upon notice to the defendant, first in special cases, then generally; and now they are usually inserted as a matter of course in England and in most of the United States, although in some of the circuits the Federal judges are accustomed to grant injunctions without such a requirement. The reason for the requirement is that upon an interlocutory application but a short time is allowed for the preparation of the case, and it is impossible for the court to obtain a complete knowledge of the facts. Moreover these applications are heard upon affidavits, so that it is impossible to say which side will ultimately turn out to be right. Consequently the court reserves the right to indemnify the defendant in case it should have been induced, upon an incomplete state of facts, to make a wrong order.[3] It is not usual to require security from the United States when a preliminary injunction is granted at their request in a suit in which they are plaintiffs.[4] It has been held that, where there is proof that the defendant has been guilty of bad faith in connection with the subject of the suit, no bond should be required.[5] In some instances the court has withheld an injunction to restrain an infringement of a patent or copyright, upon the defendant's merely undertaking to keep an account of the sales made by him during the pendency of the suit;[6] and in England in other cases upon his giving undertaking to abide by the farther order of the court.[7] An injunction will never be issued to restrain the collection of State taxes, unless the plaintiff first pays "what is conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavit, whether conceded or not."[8] It has been held at circuit that when the

[3] Smith v. Day, 21 Ch. D. 421. See Lowenfeld v. Curtis, 72 Fed. R. 105.

[4] U. S. v. Jellico, M. C. & C. Co., 43 Fed. R. 898.

[5] Pasteur C. F. Co. v. Funk, 52 Fed. R. 146, 147.

[6] Furbush v. Bradford, 1 Fish. Pat. Cas. 317; McCrary v. Penn. C. Co., 5 Fed. R. 367; Kerr on Inj. 29, 30.

[7] Atty. Gen. v. M. & L. Ry. Co., 1 (Eng.) Ry. Cas. 436; Jones v. G. W. Ry. Co., 1 (Eng.) Ry. Cas. 684.

[8] State Railroad Tax Cases, 92 U. S. 575, 617; National Bank v. Kimball, 103 U. S. 732; Albuquerque Nat. Bank v. Perea, 147 U. S. 87; Parmley v. Railroad Cos., 3 Dill. 25; Huntington v. Palmer, 8 Fed. R. 449; *supra*, § 84.

court upon the final hearing dissolves an injunction previously granted, or grants an injunction previously denied upon the giving of a bond or undertaking, the successful party can have his damages assessed and the bond or undertaking enforced by the court in the same suit, without being required to bring a new action at law.[9] Where the amount of the recovery is uncertain, the sureties should have notice of the application to enforce the bond.[10] It has been held that a Circuit Court has jurisdiction of an action at law upon the bond where it exceeds $2,000, irrespective of the citizenship of the parties, because the suit arises under the laws of the United States.[11] The court has power, when dissolving the injunction, to absolve the bondsmen from liability.[12] It is unsettled in England whether the undertaking can be enforced upon the dissolution of the injunction on the ground that the court erred as to the law.[13] Only direct and approximate damages can be recovered upon the bond; remote, conjectural and speculative damages are disallowed.[14] It has been held by the Supreme Court that the

[9] Lea v. Deakin, 13 Fed. R. 514; Cocsaw Min. Co. v. Farmers' Min. Co., 51 Fed. R. 107; Lamb v. Ewing (C. C. A.), 54 Fed. R. 269; *supra*, § 21. See also Russell v. Farley, 105 U. S. 433; Leslie v. Brown (C. C. A.), 90 Fed. R. 171; Deakin v. Stanton, 8 Fed. R. 435; Grundy v. Young, 2 Cranch, C. C. 114; Bentley v. Joslin, Hempst. 218; Moore v. Moore, 25 Beav. 8; Sugden v. Hull, 28 Beav. 263. *Contra*, Curtis, J., in Merryfield v. Jones, 2 Curt. 306. See also Bein v. Heath, 13 How. 168.

[10] Cocsaw M. Co. v. Carolina M. Co., 74 Fed. R. 860: Leslie v. Brown (C. C. A.), 90 Fed. R. 171.

[11] Leslie v. Brown, 90 Fed. R. 171.

[12] Russell v. Farley, 105 U. S. 433. *Cf.* Allen v. Jones, 79 Fed. R. 698.

[13] Smith v. Day, 21 Ch. D. 421, 424, 426, 428, 429, 431. But see Novello v. James, 5 De G., M. & G. 876.

[14] Smith v. Day, 21 Ch. D. 421; Chicago C. R. Co. v. Howison, 86 Ill. 215; Hotchkiss v. Platt, 8 Hun (N. Y.), 46; Livingston v. Exum, 19 S. C. 223. Where the injunction forbade interference with the possession of personal property, it was held that the defendant upon the dissolution could recover all damages caused by his delay in obtaining possession of the property, including any loss caused by a fall in the market price, if it had a market price, and could have been sold at once on the market for a sum nearly equal to its value, but not if it had no market price, and could not have been sold immediately for a sum "anything like its value;" and that the price which the defendant might have made by the use of the property in his business was too remote and speculative to be recovered. Lehman v. McQuown, 31 Fed. R. 138. It has been held that "an injunction bond in an action in the District Court of the United States for the District of Louisiana, conditioned that the obligors 'will well and truly pay the' obligee, 'defendant in said injunction, all such damages as he may recover against us,

fees of counsel in procuring the dissolution of the injunction cannot be included in the damages upon the bond.[15] This decision is, however, in conflict with the weight of authority in the United States.[16] The court might direct the insertion of a clause in the bond providing that counsel fees should be included in the damages. Where no security is given, the defendant has no remedy to recover damages caused by an injunction improperly issued, unless, perhaps, where facts will support an action for malicious prosecution.[17] The surety cannot, pending an appeal from a decree for the defendant to the injunction suit, maintain a bill of *quia timet* to obtain indemnity from the principal before the bond has been paid or the amount of the liability upon the same has been adjudicated.[18]

§ 237. Perpetual injunctions.—Perpetual injunctions can only be granted at the entry of a decree.[1] It is irregular to grant one upon affidavits.[2] In patent, trade-mark and copyright cases, however, injunctions that are permanent until the expiration of the plaintiff's monopoly are often granted by an interlocutory decree which also directs a reference to a master for an accounting;[3] but the court has the power to suspend the injunction until an appeal can be had.[4] A perpetual injunction is either originally granted, or continued. They may

in case it should be decided that the said writ of injunction was wrongfully issued,' which bond was made under an order of the court 'that the injunction be maintained on the complaining creditor's giving bond and security to save the parties harmless from the effects of said injunction,' is a sufficient compliance with the order of the court, and when construed with reference to the rule prevailing in the Federal courts (contrary to that prevailing in the State courts of Louisiana), that without a bond and in the absence of malice no damages can be recovered in such case, means that the obligors will pay such damages as the obligee may recover against them in a suit on the bond itself, whether incurred before or after the giving of the bond." Meyers v. Block, 120 U. S. 206.

[15] Oelrichs v. Spain, 15 Wall. 211.

[16] See High on Inj., sec. 1685, and cases cited.

[17] Scheck v. Kelly, 95 Fed. R. 941; City of St. Louis v. St. Louis Gaslight Co., 82 Mo. 354.

[18] Am. B. & Tr. Co. v. Logansport & M. G. Co., 95 Fed. R. 49.

§ 237. [1] Daniell's Ch. Pr. (2d Am. ed.) 1903.

[2] Adams v. Crittenden, 17 Fed. R. 42.

[3] Rumford Chem. Works v. Hecker, 11 Off. Gaz. 330; Brown v. Deere, 6 Fed. R. 484; s. c., 2 McCrary, 425.

[4] Barnard v. Gibson, 7 How. 650, 658; Potter v. Mack, 3 Fish. 428; Brown v. Deere, 6 Fed. R. 487; Munson v. Mayor, 19 Fed. R. 813.

be granted originally in all cases in which temporary injunctions might have been granted, and also to restrain the setting up of outstanding terms when it would be inequitable to do so.[5] In order to obtain a perpetual injunction, it is not necessary that a provisional injunction should have been asked for.[6] For after the commencement of a suit asking to prevent an act upon the defendant's part, he is said to proceed at his peril, and if the court finally decides in favor of the plaintiff it may order him to undo the result of his acts since he first had notice of the suit.[7] A perpetual injunction may be obtained in a case where a preliminary injunction has been asked for and refused, or obtained and dissolved.[8] If, however, the plaintiff has not previously obtained a preliminary injunction, and at the hearing fails to make out a clear title, he usually will not be allowed to use the facts proved by him, as evidence of a *prima facie* case, entitling him then to a temporary injunction till he can establish his case beyond a doubt;[9] unless indeed, the injunction sought be one that is never granted before a hearing.[10] Perpetual injunctions may continue or extend and make perpetual preliminary injunctions at the hearing. This can only be done by inserting a direction to that effect in the decree.[11] In order to support a decree for a perpetual injunction, it has been said that the court requires that there should be nothing like a doubt in the case.[12] The granting of such an injunction is in the discretion of the court, and, like a provisional injunction, it may be allowed[13] or refused[14] upon terms. On account of

[5] Askew v. Poulterers' Co., 2 Ves. Sen. 89; Duke of Buckingham v. Duchess of Buckingham, 2 Eq. Cas. Abr. 527.

[6] Daniell's Ch. Pr. (2d Am. ed.) 1900. See also Bailey v. Taylor, 1 R. & M. 73.

[7] Charles River Bridge v. Warren Bridge, 6 Pick. (Mass.) 376; Wing v. Fairhaven, 8 Cush. (Mass.) 363; Winslow v. Nayson, 113 Mass. 411; Smith v. Day, L. R. 13 Ch. D. 651.

[8] Daniell's Ch. Pr. (2d Am. ed.) 1900; Bailey v. Taylor, 1 R. & M. 73; Bacon v. Spottiswoode, 1 Beav. 382; Bacon v. Jones, 4 M. & C. 433; Tucker v. Carpenter, Hempst. 440.

[9] Bacon v. Spottiswoode, 1 Beav. 382; s. c. on appeal, *sub nom.* Bacon v. Jones, 4 M. & C. 433, 438; Daniell's Ch. Pr. (2d Am. ed.) 1901.

[10] Daniell's Ch. Pr. (2d Am. ed.) 1901. See *supra*, § 226.

[11] Daniell's Ch. Pr. (2d Am. ed.) 1902; Gardner v. Gardner, 87 N. Y. 14.

[12] Whittingham v. Woler, 2 Swanst. 428, n.; Troy & B. R. Co. v. Boston, H. T. & W. Ry. Co., 86 N. Y. 107; Daniell's Ch. Pr. (2d Am. ed.) 1900.

[13] Southern Exp. Co. v. St. Louis, I. M. & S. Ry. Co., 10 Fed. R. 210; s. c., 10 Fed. R. 869.

[14] McCrary v. Penn. Canal Co., 5 Fed. R. 367; Brown v. Deere, M. & Co., 6 Fed. R. 487.

the weight as a precedent given to a decree for a permanent injunction in a patent case, the court may refuse to grant one when the case has been compromised and the defendant abandons it at the hearing.[15]

§ 238. **Appeals from injunction orders.**—"Where, upon a hearing in equity in a District Court or a Circuit Court, or by a judge thereof in vacation, an injunction shall be granted or continued, or a receiver appointed by an interlocutory order or decree, in a case in which an appeal from a final decree may be taken under the provisions of this act to the Circuit Court of Appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction, or appointing such receiver, to the Circuit Court of Appeals: provided, that the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court or by the appellate court or judge thereof during the pendency of such appeal: provided further, that the court below may in its discretion require, as a condition of the appeal, an additional bond."[1] There is no appeal to the Supreme Court of the United States from any of such orders;[2] but the Circuit Court of Appeals can certify to the Supreme Court any question involved upon said appeal, even a question of jurisdiction.[3] A Circuit Court of Appeals has jurisdiction of such an appeal, even, it seems, when the only question in dispute is one of jurisdiction.[4] It has been held that a Circuit Court of Appeals has no jurisdiction of an appeal when the construction of the Constitution of the United States, or when the validity or construction of a treaty made by the United States, is the sole question involved.[5] It seems that where such a question is

[15] Hayes v. Leton, 5 Fed. R. 521.

§ 238. [1] 26 St. at L. 826; 31 St. at L. 660. As to bond pending appeal, see Cotting v. Kansas City S. Y. Co., 82 Fed. R. 850.

[2] Kirwan v. Murphy, 170 U. S. 205.

[3] In re Tampa S. R. Co., 168 U. S. 583.

[4] In re Tampa S. R. Co., 168 U. S. 583; Lake Nat. Bank v. Wolfeborough Sav. Bank (C. C. A.), 78 Fed. R. 517. But see Carson v. Combe (C. C. A.), 86 Fed. R. 202; Lake Street El. R. Co. v. Farmers' L. & Tr. Co. (C. C. A.), 77 Fed. R. 769.

[5] Westerly v. Westerly Water Works, 76 Fed. R. 467; s. c., 22 C. C. A. 278; Mayor, etc. of Macon v. Ga. P. Co. (C. C. A.), 60 Fed. R. 781; Hastings v. Ames (C. C. A.), 68 Fed. R.

combined with other questions of a different character, a Circuit Court of Appeals may, if the constitutional or treaty question is controlling, decline to take jurisdiction of the appeal, or may certify the constitutional or treaty question to the Supreme Court, and after that question is there decided proceed to judgment upon the appeal, or may decide the whole case in the first instance.[6] Under this act the Circuit Courts of Appeals have jurisdiction to review, not only orders granting preliminary injunctions, but also interlocutory decrees made after a hearing upon the merits which grant perpetual injunctions and refer the cases to a master to ascertain profits and damages.[7] It was held that a docket entry in a suit to enjoin the infringement of a patent, "Opinion — decree for complainants," did not constitute a decree for an injunction, although the opinion filed directed that an injunction be granted; and that no appeal could be taken until a decree was entered.[8] The fact that the order or decree which grants an injunction also gives other relief, which, if granted alone, could not be reviewed until the final decree, does not prevent a review of the entire order.[9] The Circuit Court of Appeals can then reverse the whole order and dismiss the bill or grant such other final relief upon the merits as the case before it may justify.[10] Such final disposition of the case will not, however, ordinarily be made where the evidence has not been taken by deposition, unless the pleadings or the undisputed facts show that there can either be no right to relief or no defense to the bill.[11] But where, before

726; Central Tr. Co. v. Citizens' St. Ry. Co., 82 Fed. R. 1; Indianapolis v. Central Tr. Co. (C. C. A.), 83 Fed. R. 529; Illinois Cent. R. Co. v. Adams (C. C. A.), 93 Fed. R. 852.

[6] Carter v. Roberts, 177 U. S. 496, 500; Cincinnati, H. & D. R. Co. v. Thiebard, 177 U. S. 615-620; Pike's P. P. Co. v. Colorado Springs (C. C. A.), 105 Fed. R. 1, 7.

[7] Lockwood v. Wickes (C. C. A.), 75 Fed. R. 118; Raymond v. Royal B. P. Co. (C. C. A.), 76 Fed. R. 465. But see Standard El. Co. v. Crane El. Co. (C. C. A.), 76 Fed. R. 767.

[8] Herrick v. Cutcheon (C. C. A.), 55 Fed. R. 6; s. c., 5 C. C. A. 21.

[9] In re Tampa S. R. Co., 168 U. S. 583; Smith v. Vulcan Iron Works, 165 U. S. 518.

[10] Ibid.

[11] Highland Ave. & B. R. Co. v. Columbian Eq. Co., 168 U. S. 627; Lake Nat. Bank v. Wolfeborough Sav. Bank (C. C. A.), 78 Fed. R. 517; U. S. Rubber Co. v. Am. O. L. Co. (C. C. A.), 82 Fed. R. 248. But see Fidelity I. T. & S. D. Co. v. Dixon (C. C. A.), 78 Fed. R. 205. Upon such an appeal the discretion of the court below may be reviewed. Charles E. Hires Co. v. Consumers' Co. (C. C. A.), 100 Fed. R. 809.

the act authorizing appeals from orders appointing receivers, an order appointed a receiver and contained no other injunction than the usual mandate that the defendant, its officers, agents and employees deliver to him the property in their hands, it was held that it was not appealable.[12] An order vacating the appointment of a receiver and staying all further proceedings in the suit in which the receiver was appointed was held to be an injunction order and appealable.[13] No appeal can be taken from an interlocutory order or decree which denies or which dissolves an injunction.[14]

[12] Bissell C. S. Co. v. Goshen S. Co. (C. C. A.), 72 Fed. R. 545; Marden v. Campbell Pr. & Mfg. Co. (C. C. A.), 67 Fed. R. 809.

[13] Baker v. Walter Baker & Co. (C. C. A.), 88 Fed. R. 8. See Tornanses v. Melsing (C. C. A.), 106 Fed. R. 775; In re McKenzie, 180 U. S. 536.

[14] Columbia Wire Co. v. Boyce (C. C. A.), 104 Fed. R. 172; Omaha & S. W. R. Co. v. Chicago, St. P., M. & O. Ry. Co. (C. C. A.), 106 Fed. R. 586.

CHAPTER XVII.

RECEIVERS.

§ 239. Definition of receiver.— A receiver is an officer appointed by a court of equity to assume the custody of property pending litigation concerning the same. The effect of the appointment of a receiver is to put the property in his custody as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title or even the right of possession to the property.[1] In England the term is usually applied only to those appointed to receive the rents and profits of land and to get in outstanding property; and one selected to carry on or superintend a trade or business is usually denominated "a manager," or "a receiver and manager."[2] But in the United States both classes of officers are called receivers. The Revised Statutes authorize the Comptroller of the Currency to appoint in certain cases a receiver of a national banking association, whose powers and duties are in many respects analogous to those of a receiver appointed by a court of equity.[3] But, as the learning upon this subject does not concern the practice of courts of equity, it will not be considered here.

§ 240. When receivers will be appointed.— A receiver may be appointed to provide for the safety of property pending litigation to determine the title to the same; to preserve property in danger of being dissipated or destroyed by those having the legal title to its possession; to preserve the property of infants during their minority, when they have no guardian and their parents are dead or unfit to be trusted with it; to preserve the property of idiots and lunatics when it is impossible to obtain a proper person as committee; and when the appointment is authorized by statute.[1] A receiver may be appointed to provide for the safety of property pending litigation to determine

§ 239. [1] Union Bank v. Kansas C. Bank, 136 U. S. 223, 236.

[2] Daniell's Ch. Pr. (2d Am. ed.) 2006.

[3] See U. S. R. S., §§ 5234–5237; 19 St. at L. 63; 1st Supp. U. S. R. S. 216; 24 St. at L., ch. 28, p. 8; Price v. Abbott, 17 Fed. R. 506; *supra*, § 15; *infra*, §§ 240, 880.

§ 240. [1] Kerr on Receivers (2d Am. ed.), 8.

the title to the same, whether the litigation is in a court of equity,[2] of probate,[3] of bankruptcy,[4] in a foreign court,[5] or sometimes, though very rarely, in a court of law.[6] The most usual cases where a receiver is appointed are, suits in equity to obtain equitable assets, for the foreclosure of a mortgage, and for the dissolution or winding up of the affairs of a partnership. It was the English rule that a receiver could not be appointed at the suit of a first mortgagee, since he had it in his power to take possession himself.[7] In this country, however, receivers are frequently appointed in such a case.[8] Ordinarily, a receiver of the effects of a partnership will not be appointed unless the bill prays a dissolution and shows a proper case for the same.[9] But where suits have been instituted to compel partners to act according to the provisions of instruments into which they have entered, the court will take care that the decree shall not be defeated by anything to be done in the mean time, and may appoint a receiver to protect the property.[10] Receivers may be appointed to preserve property in danger of being dissipated or destroyed by those having the legal title to its possession, at the suit of beneficiaries, legatees, next of kin, or creditors, where a trustee,[11] executor,[12] or administrator [13] is in-

[2] Davis v. Duke of Marlborough, 2 Swanst. 108; Curling v. Marquis Townshend, 19 Ves. 628. But see Moore v. Bank of Br. Columbia, 106 Fed. R. 574.

[3] King v. King, 6 Ves. 172; Matter of Colvin, 3 Md. Ch. Dec. 279; Robinson v. Taylor, 42 Fed. R. 803; Kerr on Receivers (2d Am. ed.), 28-37.

[4] Sedgwick v. Place, 3 N. B. R. 35; Alabama & C. R. Co. v. Jones, 5 N. B. R. 97; Keenan v. Shannon, 9 N. B. R. 441. See 30 St. at L. 544, 546, § 2.

[5] Transatlantic Co. v. Pietroni, Johns. 604.

[6] Talbott v. Scott, 4 K. & J.,96; Fingal v. Blake, 2 Molloy, 50; Whitney v. Buckman, 26 Cal. 447; Horton v. White, 84 N. C. 297; Jeffreys v. Smith, 1 J. & W. 298; Robinson v. Taylor, 42 Fed. R. 803. But see Tornanses v. Melsing (C. C. A.), 106 Fed. R. 775.

[7] Berney v. Sewell, 1 J. & W. 647.

[8] See, for example, Stanton v. Alabama & C. R. Co., 2 Woods, 506; Allen v. D. & W. R. Co., 3 Woods, 316, 326.

[9] Goodman v. Whitcomb, 1 J. & W. 589; Oliver v. Hamilton, 2 Anst. 453; Daniell's Ch. Pr. (2d Am. ed.) 1966, 1967; Kerr on Receivers (2d Am. ed.), 93.

[10] Daniell's Ch. Pr. (2d Am. ed.) 1967; Const v. Harris, T. & R. 496.

[11] Hagenbeck v. Hagenbeck Z. A. Co., 59 Fed. R. 14; McCosker v. Brady, 1 Barb. Ch. (N. Y.) 329; Brodie v. Barry, 3 Meriv. 695; Janeway v. Green, 16 Abb. Pr. (N. Y.) 215, note.

[12] Utterson v. Mair, 2 Ves. Jr. 95; Scott v. Becher, 4 Price, 346. But see Gladdon v. Stoneman, 1 Madd. 143, n.; Langley v. Hawk, 5 Madd. 46; Kerr on Receivers (2d Am. ed.),20.

[13] Hervey v. Fitzpatrick, Kay, 421; Ware v. Ware, 42 Ga. 408.

solvent and has not given bonds, or is guilty of misconduct; or where two trustees or executors disagree so that it is impossible for them to act together;[14] and at the suit of remainder-men, where the holder of the particular estate is guilty of voluntary or permissive waste,[15] or improperly refuses to renew leaseholds.[16] In the case of trustees, the court will thus interfere whether the trust is express or implied.[17] A receiver may be appointed over the property of an infant,[18] when the latter has no guardian, or his guardian is insolvent or has been guilty of misconduct,[19] and has no parents, or his parents are unfit to be intrusted with the care of his estate.[20] Receivers may be appointed over the property of idiots and lunatics, when no person can be found disposed to act as committee;[21] or, it seems, when the committee is infirm, or the management of the estate is very onerous, or the committee lives far from the estate.[22] The statutes of the several States authorize the appointment of receivers in numerous cases, especially in providing for the dissolution of corporations. In so far as State statutes authorize the appointment of receivers, they will be followed by the Federal courts, provided at least that they do not deprive a party of a trial by jury to which he would have been entitled at common law; and the Federal courts will also observe the statutory conditions required for such appointments, but not the State practice.[23] State statutes forbidding the appointment of receivers or the taking of possession by a mortgagee in certain cases will not be followed by the Federal courts.[24] The

[14] Ball v. Tompkins, 41 Fed. R. 486.

[15] Vose v. Reed, 1 Woods, 647, 650.

[16] Bennett v. Colley, 2 M. & K. 225; s. c., 5 Sim. 181, 192; Lord Montford v. Lord Cadogan, 17 Ves. 485.

[17] Pritchard v. Fleetwood, 1 Meriv. 54; Daniell's Ch. Pr. (5th Am. ed.) 1724.

[18] Hicks v. Hicks, 3 Atk. 277; Union Tr. Co. v. Ill. M. R. Co., 117 U. S. 434; Sage v. M. & L. R. Co., 125 U. S. 361; Kerr on Receivers (2d Am. ed.), 16–18.

[19] Pitcher v. Helliar, Dick. 580; High on Receivers, §§ 725–732.

[20] Butler v. Freeman, Amb. 301; Kiffin v. Kiffin, cited in 1 P. Wms. 795; Kerr on Receivers (2d Am. ed.), 16–18.

[21] Ex parte Warren, 10 Ves. 622; Anon., 1 Atk. 578; Ex parte Radcliffe, J. & W. 639; Kerr on Receivers (2d Am. ed.), 113, 114.

[22] Kerr on Receivers (2d Am. ed.), 113, 114, citing Re Birch, Shelf. on Lun. 146; Re Seaman, Shelf. on Lun. 146.

[23] Bates v. International Co. of Mexico, 84 Fed. R. 518; Flash v. Wilkerson, 23 Fed. R. 689; Fechheimer v. Baum, 37 Fed. R. 167; Tomlinson & W. Mfg. Co. v. Shatto, 34 Fed. R. 380; Davis v. Gray, 16 Wall. 203, 219, 220; *supra*, § 7.

[24] American Nat. Bank v. Northwestern M. I. Co., 89 Fed. R. 610; *supra*, § 6.

statutes of the United States authorize the appointment of a receiver of a national bank by the Comptroller of the Currency in certain specified cases.[25] Until the Comptroller has acted, a court of the United States may appoint a receiver of the assets of such a corporation.[26] After the appointment by the Comptroller of such a receiver, it is doubtful whether a court of the United States would appoint another; and after the appointment of a receiver by a court of competent jurisdiction, it is doubtful whether the Comptroller of the Currency could thus interfere.[27]

Independently of statutory authority, a court of equity will ordinarily appoint a receiver of the property of a corporation in only eight classes of cases: firstly, at the suit of mortgagees[28] or other holders of liens upon it;[29] secondly, at the suit of judgment creditors seeking equitable assets after executions have been returned unsatisfied, and the return shows that there is no corporate property upon which a levy can be made;[30] thirdly, at the suit of persons interested in the property, whether as stockholders[31] or creditors, even creditors without judgments or liens,[32] where there is a breach of duty by the directors, and

[25] U. S. R. S., §§ 5141, 5191, 5195, 5201, 5205, 5234, 5235, 5236; Laws of 1876, ch. 156 (19 St. at L., p. 63); 1st Supp. U. S. R. S., p. 216; *supra*, § 15; *infra*, §§ 240, 330.

[26] Wright v. Merchants' Nat. Bank, 1 Flippin, 568; Irons v. Mfrs. Nat. Bank, 6 Biss. 301.

[27] Harvey v. Lord, 10 Fed. R. 236.

[28] Milwaukee & M. R. Co. v. Soutter, 2 Wall. 510; Mercantile Tr. Co. v. Missouri, K. & T. Ry. Co., 36 Fed. R. 221. But see Trust & D. Co. of Onondaga v. Spartanburg Water Works, 91 Fed. R. 324.

[29] D. A. Tompkins Co. v. Catawba Mills, 82 Fed. R. 780, 783.

[30] Covington D. Co. v. Shepherd, 21 How. 112; Shainwald v. Lewis, 6 Fed. R. 166, 775; Buckeye E. Co. v. Donau Br. Co., 47 Fed. R. 6. See Brown v. Lake S. I. Co., 134 U. S. 530, 534; Sage v. Memphis & L. R. R. Co., 125 U. S. 361.

[31] Evans v. Coventry, 5 De G., M. & G. 911; Powers v. Blue Grass B. & L. Ass'n, 86 Fed. R. 705. But see Edwards v. Bay State Gas Co., 91 Fed. R. 942; Hunt v. American Grocery Co., 80 Fed. R. 70; Becker v. Hoke, 80 Fed. R. 973; Texas C. C. & Mfg. Ass'n v. Storrow, 92 Fed. R. 5; Ranger v. Champion C. P. Co., 52 Fed. R. 609.

[32] Sage v. Memphis & L. R. R. Co., 125 U. S. 361; Consolidated T. L. Co. v. Kansas C. V. Co., 43 Fed. R. 204; Doe v. Northwestern C. & T. Co., 64 Fed. R. 928; Merchants' Nat. Bank v. Chattanooga C. Co., 53 Fed. R. 614. *Contra*, Leary v. Columbia R. & S. S. Nav. Co., 82 Fed. R. 775; Texas C. C. & Mfg. Ass'n v. Storrow (C. C. A.), 92 Fed. R. 5; Syers v. Brighton Br. Co., 11 L. T. (N. S.) 560; Mills v. Northern Ry. of B. A. Co., 23 L. T. (N. S.) 719. See Pennsylvania Co. for Insurance, etc. v. Jacksonville, T. & K. W. Ry. Co. (C. C. A.), 55 Fed. R. 131. That

an actual or threatened damage of a serious nature; fourthly, where a corporation has been dissolved and has no officer to attend to its affairs;[33] fifthly, where for a long time the corporation has ceased to transact business and its officers have ceased to act;[34] sixthly, where the governing body is so divided and engaged in such mutual contentions that its members cannot act together;[35] seventhly, at the suit of unsecured creditors, where the corporation makes no defense and waives its right to require the complainants to reduce their claims to judgment, upon proof that the corporation is insolvent, that unless the court interferes its business will be interrupted by the levy of judgments and executions, and that the continuance of such business is necessary for the convenience of the public, or possibly when such interruption will greatly depreciate the value of its assets;[36] and eighthly, in a few cases receivers have been appointed at the application of the corporations themselves, made before default in the payment of mortgage interest, where it was for the interest of the public that the corporate business, the operation of a railroad, should be continued without interruption, it was hopelessly insolvent, and there was danger of attempts by creditors to gain preference by attachments or otherwise in such a manner as would have stopped the operation of the railroad.[37]

lienholders have a right to a receiver in such a case is held in Farmers' L. & Tr. Co. v. Winona & Str. Ry. Co., 59 Fed. R. 957. See Herrick v. Grand Trunk Ry. Co., 7 Upper Can. 240.

[33] The Late Corporation of the Church of J. C. of L. D. S. v. U. S., 136 U. S. 1; Lawrence v. Greenwich F. Ins. Co., 1 Paige (N. Y.), 587. See also Hamilton v. Accessory T. Co., 26 Barb. (N. Y.) 46; Murray v. Vanderbilt, 39 Barb. (N. Y.) 140.

[34] Warren v. Fake, 49 How. Pr. (N. Y.) 430.

[35] Featherstone v. Cooke, L. R. 16 Eq. 298; Trade Auxiliary Co. v. Vickers, L. R. 16 Eq. 303; D. A. Tompkins Co. v. Catawba Mills, 82 Fed. R. 780. For the appointment of a receiver because of a controversy between bondholders, see Benedict v. St. Joseph & W. R. Co., 19 Fed. R. 173. For an extraordinary case, where a receiver was appointed because of a dispute with one stockholder, see Arents v. Blackwell's D. T. Co., 107 Fed. R. 338.

[36] See Hollins v. Brierfield C. & I. Co., 150 U. S. 371; Sage v. Memphis St. R. Co., 125 U. S. 361; Consolidated T. Co. v. Kansas C. T. Co., 43 Fed. R. 204; Doe v. Northwestern C. & T. Co., 64 Fed. R. 928; Merchants' Nat. Bank v. Chattanooga C. Co., 53 Fed. R. 314; Park v. N. Y., L. E. & W. R. Co., 70 Fed. R. 641; Enos v. N. Y. & O. R. Co., 103 Fed. R. 47. But see Leary v. Columbia & P. S. Nav. Co., 82 Fed. R. 775; Texas C. C. & Mfg. Co. v. Storrow (C. C. A.), 92 Fed. R. 5.

[37] Wabash, St. L. & P. Ry. Co. v. Central Tr. Co., 22 Fed. R. 138; s. c., 22 Fed. R. 272; s. c., 22 Fed. R. 513, 515; Brassey v. N. Y. & N. E. R. Co.,

A court has no jurisdiction to appoint a receiver of the property of a corporation or other person not a party to the suit.[38] It is doubtful whether the receiver of a corporation can be appointed by a Federal court at the suit of a shareholder whose shares are not worth more than $2,000.[39] A court of equity will often appoint a receiver of a railroad in a suit for the foreclosure of a mortgage containing a clause pledging its tolls and income, when it would not do so if no such clause were included in the mortgage.[40]

Usually a receiver will not be appointed at the suit of subsequent lienors over property of which a mortgagee is in possession; but an injunction may be issued to prevent the mortgagor from applying the rents and profits to any other purpose than the satisfaction of the mortgage.[41] It has been held that an assignment made by a corporation for the benefit of creditors after the filing of a bill for the appointment of a receiver will not deprive the court of jurisdiction to appoint a receiver.[42] When a railroad is in the hands of receivers pending a foreclosure suit, the court may extend the receivership over a portion of the road for the benefit of an intervenor claiming a prior lien thereupon.[43] Where a receiver has been appointed at the suit of a judgment or other creditor, his suit may be consolidated with a subsequent foreclosure suit, and the receivership extended for the benefit of the mortgagee.[44] Where a receiver was appointed at the suit of a creditor, with the requisite difference of citizenship, the mortgagee has been allowed to intervene, file a cross-bill to foreclose the mortgage and take the benefit of the receivership, although the mortgagor and

19 Fed. R. 668. *Contra*, Hugh v. McRae, Chase, 466. As to receiverships of foreign corporations, see Leary v. Columbia R. & P. S. Nav. Co. (C. C. A.), 82 Fed. R. 776; Republican M. Silver Mines v. Brown (C. C. A.), 58 Fed. R. 644; *infra*, § 242.

[38] Hook v. Bosworth, 64 Fed. R. 443.

[39] Robinson v. West Va. L. Co., 90 Fed. R. 770. *Contra*, Towle v. American B. L. & Inv. Soc., 60 Fed. R. 131.

[40] Tysen v. Wabash R. Co., 8 Biss. 247. "The rights of holders of negotiable bonds issued by a railroad company and secured by a mortgage on its property are not to be measured by the same rules as are applied to an ordinary mortgage on a farm or house and lot, to secure one or two notes held by one mortgagee." Allen v. D. & W. R. Co., 3 Woods, 316, 326, per Woods, J.

[41] U. S. v. Marich, 44 Fed. R. 19.

[42] Belmont Nail Co. v. Columbia I. & S. Co., 46 Fed. R. 8.

[43] Mercantile T. Co. v. Mo., K. & T. Ry. Co., 41 Fed. R. 8, 9.

[44] Lloyd v. Chesapeake, C. & S. W. R. Co., 65 Fed. R. 351.

mortgagee were citizens of the same State.[45] Where a receiver had been appointed over the property of a corporation which controlled a railroad company through the ownership of a majority of its stock, it was held that he should surrender possession to a receiver of the latter corporation subsequently appointed by a State court.[46]

Upon an interlocutory application, in a suit to enjoin the infringement of a patent by an insolvent defendant, a Circuit Court appointed a receiver of the profits made by such infringement.[47] It has been held that a receiver will not be appointed to assist a trust formed to maintain a monopoly, or otherwise to aid in the prosecution of an enterprise against public policy.[48]

§ 241. Rules regulating the appointment of receivers.— It has been said that, in order to obtain the appointment of a receiver, the moving party must show, first, either that he has a clear right to the property itself, or that he has some lien upon it, or that the property constitutes a special fund to which he has a right to resort for the satisfaction of his claim; and, secondly, that the possession of the property by the defendant was obtained by fraud; or that the property itself, or the income arising from it, is in danger of loss from the neglect, waste, misconduct, or insolvency of the defendant.[1] The appointment of a receiver is always in the discretion[2] of the court, which, however, must be exercised with great circumspection,[3] and is subject to review by an appellate court.[4] It has been said, that the appointment can be made only in accordance

[45] Park v. N. Y., L. E. & W. R. Co., 64 Fed. R. 190; s. c., 70 Fed. R. 641.

[46] Central R. & B. Co. v. Farmers' L. & Tr. Co., 56 Fed. R. 357.

[47] Parkhurst v. Kinsman, 2 Blatchf. 78.

[48] American B. & Mfg. Co. v. Klotz, 44 Fed. R. 721.

§ 241. [1] Chancellor Buckner in Mays v. Rose, Freeman's Ch. (Miss.) R. 703, 718. See also Beecher v. Bininger, 7 Blatchf. 170; Tysen v. Wabash R. Co., 8 Biss. 247. "Mere insolvency arising from no proved fault in the management of a private corporation is not a sufficient ground. There should be some evidence of waste or mismanagement or carelessness or fraud or extravagance, wantonness or collusion; some ground to apprehend that the property will suffer deterioration or serious injury; something to show that there is danger of probable loss, or that some rights may be substantially impaired." Brawley, J., in Tr. & D. Co. v. Spartanburg Water-Works Co., 91 Fed. R. 324, 325.

[2] Owen v. Homan, 4 H. L. C. 997, 1032.

[3] Milwaukee & Minn. R. Co. v. Soutter, 2 Wall. 521.

[4] Tysen v. Wabash R. Co., 8 Biss. 247.

with the following rules: "1st. That the power of appointment is a delicate one, and to be exercised with great circumspection. 2d. That it must appear the claimant has a title to the property, and the court must be satisfied by affidavit that a receiver is necessary to preserve the property. 3d. That there is no case in which the court appoints a receiver merely because the measure can do no harm. 4th. That 'fraud or imminent danger, if the intermediate possession should not be taken by the court, must be clearly proved;' and 5th. That unless the necessity be of the most stringent character, the court will not appoint until the defendant is first heard in response to the application."[5]

§ 242. **Ancillary receivers.**— An ancillary receiver is a receiver appointed in aid of a receiver appointed by another court.[1] When a receiver has been appointed by one Federal Circuit Court, the others through judicial comity will usually appoint the same person an ancillary receiver of so much of the same estate as is within their jurisdiction.[2] The usual practice is to make such an application *ex parte;*[3] but the court may require notice to be given to the persons interested in

[5] Le Grand, C. J., in Blondheim v. Moore, 11 Md. 365, 374. See Kelly v. Bettcher, 89 Fed. R. 125; *infra*, § 252.

§ 242. [1] Jennings v. Phil. & R. R. Co., 23 Fed. R. 569; Williams v. Hintermeister, 26 Fed. R. 889.

[2] Jennings v. Phil. & R. R. Co., 23 Fed. R. 569; Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 29 Fed. R. 618; Parsons v. Charter Oak L. Ins. Co., 31 Fed. R. 305; Shinney v. N. A. S., L. & Bld'g Ass'n, 97 Fed. R. 9; Dillon v. Oregon, S. L. & U. N. Ry. Co., 66 Fed. R. 622. But see Mercantile Tr. Co. v. Kanawha & O. Ry. Co., 39 Fed. R. 337; Atkins v. Wabash, St. L. & P. Ry. Co., 29 Fed. R. 161. "When such an application is made, the court to which it is addressed exercises its own original jurisdiction. The decree in the court of the domicile of the corporation is evidence in every other State that the corporation is insolvent and that a proper case exists in that State for the appointment of a receiver, and it is to be respected accordingly in obedience to the constitutional provision whereby full faith and credit is to be given in each State to the records and judicial proceedings of every other State of the Union. But it is for the court to which the application is made to decide what remedy it should extend in the particular case and whether the proper administration of the assets requires the appointment of a receiver." Wallace, J., in Sands v. E. S. Greeley & Co. (C. C. A.), 88 Fed. R. 130, 132, 133.

[3] That is said to be the rule in the First Circuit. Platt v. Phil. & R. R. Co., 54 Fed. R. 569; Coe v. East & W. R. Co. of Ala., 52 Fed. R. 531. It has frequently been done in the Second Circuit. Buchanan v. Bay State Gas Co., October 16, 1896. In the same case ancillary receivers were thus appointed *ex parte* in the Circuit Courts of New Jersey, Pennsylvania and Massachusetts.

opposition.[4] In such a case, the appointment may be vacated after hearing parties interested.[5] The better practice is to move in a new suit instituted by the plaintiff to the bill upon which the original receiver was appointed, or by some other creditor claiming a right to share in the property of which a receiver is desired.[6] It seems that an appearance and a waiver of an objection to the jurisdiction because of non-residence may be made in the name of a defendant corporation by the receiver appointed in the State of its incorporation.[7] It seems that the application should not be made by the receiver who wishes the ancillary appointment;[8] nor in a summary application where no bill has been filed;[9] nor upon a bill which does not show the difference of citizenship or Federal question that would be essential to the jurisdiction for an original appointment. The ancillary appointment depends upon the comity of the court that has jurisdiction of the assets sought to be impounded;[10] and it may refuse to give the original receiver an ancillary appointment;[11] and after such an appointment it may remove him.[12] Upon an ancillary receivership the court that had original jurisdiction, which, in the case of a railroad company chartered by the United States, extending through several districts, should be that where the principal operating offices are situated and there is some material part of the railroad, is considered as the court of primary jurisdiction and of

[4] See Greene v. Star C. & P. Car Co., 99 Fed. R. 656.

[5] Ibid.

[6] See In re Brant, 96 Fed. R. 257.

[7] That was done in all the courts in the case of Buchanan v. Bay State Gas Co., *supra*, note 8. See *infra*, §§ 245, 249.

[8] In re Brant, 96 Fed. R. 257; Greene v. Star C. & P. Car Co., 99 Fed. R. 656.

[9] In re Brant, 96 Fed. R. 257.

[10] Central Tr. Co. v. Texas & St. L. Ry. Co., 22 Fed. R. 135; Mercantile Tr. Co. v. Kanawha & O. Ry. Co., 39 Fed. R. 337; Atkins v. Wabash, St. L. & P. Ry. Co., 29 Fed. R. 161; Kirker v. Owings (C. C. A.), 98 Fed. R. 499; Farmers' L. & Tr. Co. v. No. Pac. R. Co., 69 Fed. R. 871. But see Farmers' L. & Tr. Co. v. No. Pac. R. Co., 72 Fed. R. 26, which intimates that the ancillary appointment of the same receiver should be made in the case of a railroad extending through several districts.

[11] Mercantile Tr. Co. v. Kanawha & O. Ry. Co., 39 Fed. R. 337; Greene v. Star C. & P. Car Co., 99 Fed. R. 656. But see Farmers' Loan & Tr. Co. v. No. Pac. R. Co., 72 Fed. R. 26.

[12] Atkins v. Wabash, St. L. & P. Ry. Co., 29 Fed. R. 161; Greene v. Star C. & P. Car Co., 99 Fed. R. 656; Farmers' L. & Tr. Co. v. No. Pac. R. Co., 69 Fed. R. 871. But see Farmers' L. & Tr. Co. v. No. Pac. R. Co., 69 Fed. R. 871, 72 Fed. R. 26; Chattanooga T. Ry. Co. v. Felton, 60 Fed. R. 273.

principal decree; and proceedings in the other courts are usually considered as ancillary and subordinate thereto.[13] The accounting of the receiver is usually first instituted in the court where he was first appointed.[14] Local creditors, without liens or other security, have no absolute right to assets in the hands of the ancillary receiver prior to that of creditors in the other districts;[15] and the ancillary court may order the transmission of all the proceeds of the assets to the court of primary jurisdiction and require unsecured local creditors to present their claims for adjudication there.[16] The proceedings in the courts of ancillary administration are not binding upon that of original jurisdiction;[17] except to the extent to which they affect assets within the territorial jurisdiction of the former courts. A judgment against an ancillary receiver is not binding upon the court of primary jurisdiction.[18] The courts of ancillary administration have the power to retain the assets which they collect and to distribute them independently.[19] They usually

[13] Farmers' L. & Tr. Co. v. No. Pac. R. Co., 72 Fed. R. 26, 31. For a case of a difference between the administration in two districts of the same circuit where the circuit judge refused to interfere, see Central Tr. Co. v. Texas & St. L. Ry. Co., 22 Fed. R. 135.

[14] Jennings v. Phila. & R. R. Co., 28 Fed. R. 569. To that court also was left the determination of the propriety of continuing a traffic agreement operating in two or more States, Ames v. Union Pac. Ry. Co., 60 Fed. R. 966; and in one case even the propriety of excepting from the receivership assets within the ancillary jurisdiction. Mercantile Tr. Co. v. Baltimore & O. Ry. Co., 79 Fed. R. 888.

[15] Sands v. E. S. Greeley & Co. (C. C. A.), 88 Fed. R. 130; Smith v. Taggart (C. C. A.), 87 Fed. R. 94; Parsons v. Charter Oak L. I. Co., 31 Fed. R. 805. But see Taylor v. Life Ass'n of A., 3 Fed. R. 465; Farmers' L. & Tr. Co. v. No. Pac. R. Co., 72 Fed. R. 26, 31; Kirker v. Owings (C. C. A.), 98 Fed. R. 499; Johnson v. Southern B. & L. Ass'n, 99 Fed. R. 646. It has been held that the ancillary receiver cannot be sued for a tort of the principal receiver. Union Tr. Co. v. Atchison, T. & S. F. R. Co., 87 Fed. R. 530.

[16] Ibid.; Jennings v. Phila. & R. R. Co., 28 Fed. R. 569. For cases where foreign receivers have been allowed to collect domestic assets without ancillary appointments, see Farley v. Talbee, 55 Fed. R. 892; *supra*, § 34; *infra*, § 249.

[17] Reynolds v. Stockton, 140 U. S. 254, 272.

[18] Ibid.

[19] Kirker v. Owings (C. C. A.), 98 Fed. R. 499; Sands v. E. S. Greeley & Co. (C. C. A.), 88 Fed. R. 130; Miles v. New So. B. & L. Ass'n, 99 Fed. R. 4; N. Y. Security & Tr. Co. v. Equitable Mtge. Co., 71 Fed. R. 556. Where the courts of primary jurisdiction exacted a stipulation from the receiver as to his conduct in a suit in the ancillary jurisdiction, the court there enforced observance of such stipulation. Wheeling, B. & St. T. Ry. Co. v. Cochran, 85 Fed. R. 500.

apply them to the discharge of local liens,[20] the expenses of the ancillary receivership and to the payment of claims arising out of his management of the property before transmitting any funds to the court of primary jurisdiction.[21] An ancillary receiver is not justified in sending the assets to the court of original jurisdiction without the permission of the ancillary court; and he may be held personally responsible for such conduct.[22]

§ 243. Terms upon the appointment of receivers, and preferences in foreclosure suits.— As the appointment of a receiver is in its discretion, the court may impose terms upon the party applying for it. Thus, it may insist as a condition precedent to appointing a receiver to manage a colliery that the moving party advance the funds necessary to continue the business.[1] So a party or person interested in a suit was in England rarely appointed receiver unless he agreed to act without compensation.[2] By analogy to this rule of practice, the Supreme Court of the United States first sustained the principle granting preferences to certain classes of unsecured creditors upon the foreclosure of railroad mortgages.[3] It is the

[20] Fletcher v. Harney P. T. M. Co., 84 Fed. R. 555, where the court of primary jurisdiction expressed its views as to the proper action of the court of ancillary jurisdiction upon claims for taxes. Clyde v. Richmond & D. R. Co., 65 Fed. R. 836; Central Tr. Co. v. East Tenn., V. & G. Ry. Co., 69 Fed. R. 658. The court of primary jurisdiction remitted to the ancillary court the determination of the priority of receiver's certificates issued by the latter. Doe v. N. W. Coal & Transp. Co., 78 Fed. R. 62.

[21] Kirker v. Owings (C. C. A.), 98 Fed. R. 499.

[22] Ibid.

§ 243. [1] Gibbs v. David, L. R. 20 Eq. 373.

[2] Wilson v. Greenwood, 1 Swanst. 471.

[3] Waite, C. J., in Fosdick v. Schall, 99 U. S. 235, 251, 252. See also Turner v. Ind., B. & W. Ry. Co., 8 Biss. 315. This is said to depend upon the principle that he who seeks equity must do equity. Waite, C. J., in Fosdick v. Schall, 99 U. S. 235, 253; Farmers' L. & T. Co. v. Green Bay, W. & St. P. Ry. Co., 45 Fed. R. 664, 666, 667. "The doctrine is analogous to that of the admiralty allowing certain supplies to a vessel precedence over a mortgage upon the vessel, and rests upon the same principle. The vessel must not be allowed to rot at the wharf. The railway must not be permitted to rust, and its franchise to be forfeited, through failure to operate. Such things, therefore, that are done to avoid such result, working destruction to the mortgage, should be compensated in priority to the mortgage." So Caldwell, J., in Farmers' L. & T. Co. v. Kansas City, W. & N. W. R. Co., 53 Fed. R. 182, 190, 191. For criticisms of the practice, see Coe v. N. J. Midland Ry Co., 27 N. J. Eq. 87; Raht v. Attrill, 106 N. Y. 423; Hollister v. Stewart, 111 N. Y. 644, 668. The doctrine originated in Kentucky. Douglass v. Cline, 12 Bush (Ky.), 613 (1876).

better practice to provide for such preferences as a condition in the order for the appointment of the receiver.[4] Even where no such order has been made when the receiver was appointed, if it appears at any time in the progress of the cause that bonded interest has been paid, additional equipment provided, or repairs of the property made out of its earnings during a short time before the default in interest, the court usually directs that such debts then incurred be paid out of the income of the receivership after the payment of the receiver's expenses in preference to the claims of creditors secured by a mortgage or other lien.[5] Although usually they are paid out of the net income of the receivers, in special cases,[6] especially where this income has been used to pay for betterments or mortgage interest by a receiver appointed in the foreclosure suit,[7] or even by a receiver appointed in a prior suit to foreclose a junior lien,[8] or to preserve the property for other creditors or stockholders; such claims have been ordered paid out of the proceeds of the foreclosure sale before any payment on account of mortgage bonds; and in some cases it has been made a con-

[4] Central T. Co. v. St. Louis, A. & T. Ry. Co., 41 Fed. R. 551. For forms of such orders, see Dow v. Memphis & L. R. Ry. Co., 20 Fed. R. 260, 266, 267; Central T. Co. v. St. Louis, A. & T. Ry. Co., 41 Fed. R. 551, 553, 554.

[5] In Fosdick v. Schall, 99 U. S. 235, 253, 254; Fosdick v. Car Co., 99 U. S. 256; Hale v. Frost, 99 U. S. 389; Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 308; Union T. Co. v. Souther, 107 U. S. 591; Union T. Co. v. Walker, 107 U. S. 596; Burnham v. Bowen, 111 U. S. 776; Blair v. St. Louis, H. & K. Ry. Co., 22 Fed. R. 471, 474, with a valuable note by Benj. F. Rex, Esq., of the St. Louis bar; Porter v. Pittsburgh Bessemer S. Co., 120 U. S. 649; Virginia & A. Coal Co. v. Central R. & B. Co., 170 U. S. 355; Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257; Douglas v. Cline, 12 Bush (Ky.), 608. The rule is ordinarily otherwise when there was no diversion of the earnings from the payment of operating expenses. Penn v. Calhoun, 121 U. S. 251; St. Louis, A. & T. H. R. Co. v. Cleveland, C., C. & I. Ry. Co., 125 U. S. 658; Wood v. Guarantee T. & S. D. Co., 128 U. S. 416; Kneeland v. Am. L. & T. Co., 136 U. S. 89; Lackawanna I. & C. Co. v. Farmers' L. & T. Co., 176 U. S. 298: U. S. Trust Co. v. N. Y. W. S. & B. R. Co., 25 Fed. R. 800; Finance Co. of Pennsylvania v. Charleston, C. & C. R. Co., 52 Fed. R. 524; Ruhlender v. Chesapeake, O. & S. W. R. Co. (C. C. A.), 91 Fed. R. 5; International T. Co. v. T. B. Townsend B. & C. Co. (C. C. A.), 95 Fed. R. 850.

[6] Miltenberger v. Logansport, C. & S. W. R. Co., 106 U. S. 286, 311, 312; Virginia & A. Coal Co. v. Central R. & B. Co., 170 U. S. 355, 365–367; Blair v. St. Louis, H. & K. R. Co., 22 Fed. R. 471, 475; Kneeland v. Bass F. & M. Works, 140 U. S. 592.

[7] Ibid.

[8] Virginia & A. Coal Co. v. Central R. & B. Co., 170 U. S. 355, 370.

dition of the sale that the purchaser pay these claims in addition to the nominal amount of his bid.[9] The doctrine has been extended so as to provide for preferences to those who have furnished supplies and performed labor, and to railroad companies with connecting lines, who have claims for the settlement of ticket, freight and supply accounts, and to loans incurred within a short time before the receivership, irrespective of whether there has been a diversion of income for the benefit of the mortgage bondholders.[10] The rule has been also applied to an application for a decree of strict foreclosure instead of a sale, whereupon the decree was granted saving the rights of intervenors who held claims which in the case of a receivership would have been entitled to a preference.[11] The rule includes claims incurred by contracts made with a corporation to which was leased the railroad foreclosed, for the benefit of which the work was done, or which it had permitted to manage and operate its railroad under color of a lease or by virtue of the ownership or control of a majority of its stock.[12] It

[9] Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257.

[10] Virginia & A. Coal Co. v. Central R. Co., 170 U. S. 355, 365; Miltenberger v. Logansport, C. & S. W. R. Co., 106 U. S. 286, 311, 312: "It is easy to see that the payment of unpaid debts for operating expenses, accrued within ninety days, due by a railroad company suddenly deprived of the control of its property, due to operatives in its employ, whose cessation from work simultaneously is to be deprecated, in the interests both of the property and of the public, and the payment of limited amounts due to other and connecting lines of road for materials and repair, and for unpaid ticket and freight balances, the outcome of indispensable business relations, where a stoppage of the continuance of such business relations would be a probable result, in case of non-payment, the general consequence involving largely, also, the interests and accommodations of travel and traffic, may well place such payments in the category of payments to preserve the mortgaged property in a large sense, by maintaining the good will and integrity of the enterprise, and entitle them to be made a first lien."

[11] Burnham v. Bowen, 111 U. S. 776, 782, 783. Where the parties to a foreclosure suit waived a sale, and entered an order by consent leasing the property to another railroad and appointing a receiver of the rent, the court directed that all floating unsecured creditors should be paid out of the rent before its application in discharge of the claims of the bondholders. Farmers' L. & Tr. Co. v. Mo., I. & N. Ry. Co., 21 Fed. R. 264.

[12] Virginia & A. Coal Co. v. Central R. R. & B. Co., 170 U. S. 355; Clark v. Central R. R. & B. Co., 66 Fed. R. 803. But see Felton v. Cincinnati (C. C. A.), 95 Fed. R. 336. Such claims may also be given a preferred lien upon the whole property of the lessee or controlling company. Central of Ga. Ry. Co. v. Hitchcock (C. C. A.), 91 Fed. R.

must appear, however, in all cases, that the creditor allowed the debt to be incurred in the belief that it would be paid from the current earnings of the railroad, and that he did not rely solely upon the personal credit of the corporation with whom he made the contract,[13] and that the debt was one fairly to be regarded as part of the operating expenses of the railroad, incurred in the ordinary course of business, and to be met out of current receipts.[14] Betterments, as distinguished from repairs, are less often allowed a preference.[15] In a proper case

209; Clyde v. Richmond & D. R. Co., 56 Fed. R. 539.

[13] Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257, 290; Lackawanna I. & C. Co. v. Farmers' L. & Tr. Co., 166 U. S. 290; Virginia & A. Coal Co. v. Central R. R. & B. Co., 170 U. S. 355, and cases cited.

[14] Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257, 296.

[15] Lackawanna I. & C. Co. v. Farmers' L. & Tr. Co., 176 U. S. 298; Am. L. & Tr. Co. v. E. & W. R. Co., 46 Fed. R. 101; Farmers' L. & Tr. Co. v. Stuttgart & A. R. Co., 92 Fed. R. 246; Illinois Tr. & Sav. Bank v. Doud (C. C. A.), 105 Fed. R. 123, but see dissenting opinion of Caldwell, J.; Addison v. Lewis, 75 Va. 701, 718. Thus a claim for the construction of a bridge was denied a preference. Int. Tr. Co. v. T. B. Townsend B. & Cr. Co. (C. C. A.), 95 Fed. R. 850. *Contra*, Cleveland, C. & S. Ry. Co. v. Knickerbocker Tr. Co., 86 Fed. R. 73; Blair v. St. Louis, H. & K. Ry. Co., 23 Fed. R. 704. And for the price of gas meters which were held to be betterments and not a part of the operating expenses of a gas company. Reyburn v. Consumers' Gas, F. & L. Co., 29 Fed. R. 561. But preferences were allowed for debts incurred by the purchase of an electric generator, Man. Tr. Co. v. Sioux City C. Co., 76 Fed. R. 658; and for a new gear wheel and pinion upon a cable railway, Central Tr. Co. v. Clark (C. C. A.), 81 Fed. R. 269. In Central Tr. Co. v. Texas & St. L. Ry. Co., 23 Fed. R. 704, 705, per Treat, J.; Blair v. St. L., H. & K. R. Co., 22 Fed. R. 471, per Brewer, J.; s. c., In re Merriwether, 22 Fed. R. 769, 770, per Treat, J.; s. c., 23 Fed. R. 704, per Brewer, J., betterments were allowed a preference. There was, however, a Missouri statute (Mo. R. S., sec. 3200) which may have affected these decisions. Where a receiver had completed under an order of the court a building partly constructed for the mortgagor upon property not covered by the mortgage, it was held that the entire cost of the construction should be paid by the receiver before he made any payment to the builders. Girard I. & T. Ry. Co. v. Cooper, 162 U. S. 529.

Illinois Tr. & Sav. Bank v. Doud, 105 Fed. R. 123, 148, 149, per Sanborn, J.: "When a careful examination and analysis of the facts and opinions in all the cases in the Supreme Court upon the subject of preferential claims in suits to foreclose mortgages of *quasi*-public corporations is made, and dicta are distinguished from adjudications, the decisions of that court will be found to sustain these propositions: A mortgagee of the property, acquired and to be acquired, and of the income of a *quasi*-public corporation, such as a railroad company, obtains a lien upon the net income of the company after the current expenses of operation incurred in the ordinary course of business are paid, and impliedly agrees that the gross income shall be first applied to the payment of these

the disbursements or liabilities of a prior receiver appointed at the suit of a stockholder or junior incumbrancer may be thus given a preference when they were essential for the maintenance of the mortgaged property.[16] The mere fact that money loaned to the mortgagor was expended in paying interest upon the mortgage bonds and operating expenses so as to enable the railway company to maintain itself as a going concern is insufficient to entitle the lender to a preference.[17]

current expenses, before the net income to which he is entitles arises. A court of equity engaged in administering mortgaged railroad property under a receivership in a foreclosure suit may prefer unpaid claims for current expenses of the ordinary operation of the railroad, incurred within a limited time before the receivership, to a prior mortgage lien, in the distribution of the income or of the proceeds of the mortgaged property. If such a mortgagor diverts the current income from the payment of current expenses to the payment of interest on the mortgage debt, or to the improvement of the mortgaged property, so that current expenses remain unpaid when a receiver is appointed, the court may, out of the income accruing during the receivership, restore to the unpaid claims for current expenses the amount so diverted. But if there has been no diversion there can be no restoration, and the amount of the restoration cannot exceed the amount of the diversion. The class of claims which may be awarded a preference in payment over the prior mortgage debt in equity is limited to claims for current expenses incurred in the ordinary course of the operation of the mortgaged property within a limited time before the appointment of a receiver. It does not include claims for money loaned, or for material or labor furnished to make necessary beneficial and permanent additions or improvements to the mortgaged property. The broad language of the dicta in Fosdick v. Schall, that 'necessary operating and managing expenses, proper equipment, and useful improvements' are to be deducted from the current income before the net income out of which the mortgage debt is to be paid arises, has been disapproved and modified, and the class of claims entitled to equitable preference has been limited, by the later decisions of the Supreme Court." But see dissenting opinion of Caldwell, J. *Cf.* Farmers' L. & Tr. Co. v. Am. Waterworks Co., 107 Fed. R. 23.

[16] Kneeland v. Bass F. & M. Works, 140 U. S. 592; Miltenberger v. Logansport, C. & S. W. R. Co., 106 U. S. 286; Pennsylvania Co. for Insurance v. J. T. & K. W. Ry. Co., 93 Fed. R. 60; Reinhart v. Augusta M. & Inv. Co., 94 Fed. R. 901; Central of Ga. Ry. Co. v. Hitchcock, 91 Fed. R. 209. But see Kneeland v. Am. L. & Tr. Co., 136 U. S. 89; Am. L. & Tr. Co. v. South Atl. & O. R. Co., 81 Fed. R. 62; Ruhlender v. Ches., O. & S. W. R. Co., 91 Fed. R. 5; Thomas v. Cincinnati, N. O. & T. P. Ry. Co., 91 Fed. R. 202. See Central Appallachian Co. v. Buchanan (C. C. A.), 90 Fed. R. 454.

[17] Morgan's La. & Tr. R. & S. S. Co. v. Texas C. Ry. Co., 137 U. S. 171; Contr. & B. Co. v. Continental Tr. Co. (C. C. A.), 108 Fed. R. 1. See George v. St. Louis C. & W. Ry. Co., 44 Fed. R. 117. Where a claim to a preference is made because money

In accordance with these principles the practice arose in the Seventh Circuit to impose as a condition upon the appointment of a receiver in a suit for the foreclosure of a railroad mortgage, that debts for materials and supplies and labor furnished to the mortgagor within the six previous months be paid out of the net income or the proceeds of the sale of the road, before the debt secured by the mortgage.[18] This is called "the

was loaned the mortgagor at the request of the bondholders, a request made by all the bondholders should be shown. In re Kelly v. Green Bay & Minn. R. Co., 5 Fed. R. 846.

[18] In re Kelly v. Green Bay & Minn. R. Co., 5 Fed. R. 846. See Union Tr. Co. v. Souther, 107 U. S. 591, 593; Union Tr. Co. v. Ill. Mid. Ry. Co., 117 U. S. 434; Blair v. St. Louis, H. & K. Ry. Co., 22 Fed. R. 471, 474. Preferences have thus been given to claims for *fuel*, Burnham v. Bowen, 111 U. S. 776; Clark v. Central R. Co. of Ga. (C. C. A.), 66 Fed. R. 803; Va. & A. Coal Co. v. Central R. Co. of Ga., 170 U. S. 355; *locomotives, cars*, Fosdick v. Schall, 99 U. S. 235, 238; Fosdick v. Car Co., 99 U. S. 256; Frank v. Denver & R. G. Ry. Co., 23 Fed. R. 123; but see Continental Tr. Co. v. Toledo, St. L. & K. C. R. Co., 93 Fed. R. 532; McGoukey v. Toledo & O. C. Ry. Co., 146 U. S. 536; *car-springs* and *spirals*, Hale v. Frost, 99 U. S. 389; *repairs*, Fosdick v. Schall, 99 U. S. 235, 238; Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 311; *rails*, Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257; money advanced to pay *taxes*, Farmers' L. & Tr. Co. v. Stuttgart & A. R. Co., 92 Fed. R. 246; U. S. Tr. Co. v. Mercantile Tr. Co. (C. C. A.), 88 Fed. R. 140; *board and rations furnished employees*, Finance Co. v. Charleston, C. & C. R. Co., 49 Fed. R. 693; Northern Pac. R. Co. v. Lamont (C. C. A.), 69 Fed. R. 23; but see Newgass v. Atlantic & D. Ry. Co., 56 Fed. R. 676; *telegrams*, Newgass v. Atlantic & D. Ry. Co., 72 Fed. R. 712; *furniture, care, heat and light of stations*, Northern Pac. R. Co. v. Lamont (C. C. A.), 69 Fed. R. 23. Claims for preferences for *car-rent* are usually disallowed. Thomas v. Western Car Co., 149 U. S. 95; Grand Trunk Ry. Co. v. Central Vt. R. Co., 90 Fed. R. 163; Pullman's Palace Car Co. v. Am. L. & Tr. Co., 84 Fed. R. 18. Where a balance is due upon the purchase price of *cars* or *locomotives* delivered to the railroad company under a contract of conditional sale, and the seller reclaims them or the receiver rejects them, a claim for the value of their use or for the injury done to them while in the possession of the railroad is not entitled to a preference. Fosdick v. Schall, 99 U. S. 235, 255; Huidekoper v. Loc. Works, 99 U. S. 258; Kneeland v. Am. L. & Tr. Co., 136 U. S. 89, 97. If, however, the receiver retains them with the assent of the seller, the balance of the purchase-money, or at least the reasonable value of their use by the receiver, may be a preferred claim to that of a prior mortgagee at whose suit the receiver was appointed. Kneeland v. Am. L. & Tr. Co., 136 U. S. 89, 103; Fosdick v. Car Co., 99 U. S. 256; Frank v. Denver & R. G. Ry. Co., 23 Fed. R. 123; but not the value of their use by a former receiver appointed at the suit of a judgment creditor to which the mortgagee was a party. Kneeland v. Am. L. & Tr. Co., 136 U. S. 89, 97. But see Kneeland v. Bass F. & M. Works, 140 U. S. 592; Miltenberger v. Logansport,

six months rule."[19] Other circuits adopt a similar practice.[20] Three months is a not uncommon limitation of time.[21] Claims

C. & S. W. R. Co., 106 U. S. 286. And where the value of the purchase price is allowed a preference, it is inferior to the claims of laborers for services rendered immediately before the appointment of the receiver and subsequently to the delivery of the rolling stock to the company. Frank v. Denver & R. G. Ry. Co., 23 Fed. R. 123. A claim for *oil* necessary for use in operating a railroad, furnished before a default in interest, was subordinated to the lien of the mortgagees; but a claimant for oil furnished since such default was given an equitable lien superior to the mortgagees, when the claimant had accepted a promissory note of the railroad company on account of part of both classes of indebtedness; which note he surrendered to the receiver upon petitioning for the payment of his claim. Central Tr. Co. v. Texas & St. L. Ry. Co., 23 Fed. R. 703. A claim for *advertising* was denied a preference. Central Tr. Co. v. East Tenn., V. & G. R. Co. (C. C. A.), 80 Fed. R. 624.

It has been held that, in the absence of a State statute, judgments against a railroad company for *personal injuries* are not entitled to a preference. Farmers' L. & Tr. Co. v. Northern Pac. R. Co. (C. C. A.), 79 Fed. R. 227; Farmers' L. & Tr. Co. v. Nestelle (C. C. A.), 79 Fed. R. 748; Veatch v. Am. L. & Tr. Co. (C. C. A.), 79 Fed. R. 471; Front St. C. Ry. Co. v. Drake, 84 Fed. R. 257; Farmers' L. & Tr. Co. v. Longworth (C. C. A.), 103 Fed. R. 336. So held as to such claims not reduced to judgment. Veatch v. Am. L. & Tr. Co. (C. C. A.), 79 Fed. R. 471; St. Louis Tr. Co. v. Riley (C. C. A.), 70 Fed. R. 32; Farmers' L. & Tr. Co. v. Green B., W. & St. P. Ry. Co., 45 Fed. R. 664. See Central Tr. Co. v. East Tenn., V. & G. R. Co., 30 Fed. R. 895. *Contra*, Central Tr. Co. v. Texas & St. L. Ry. Co., 22 Fed. R. 135; Dow v. Memphis & L. R. Co., 20 Fed. R. 260, 266, 267, both by Caldwell, J. Upon the construction of the S. C. statute see Southern Ry. Co. v. Bonkright (C. C. A.), 70 Fed. R. 442; Phinizy v. Augusta & K. R. Co., 63 Fed. R. 922; Central Trust Co. v. Madden (C. C. A.), 70 Fed. R. 451; Central Tr. Co. v. Charlotte, C. & A. R. Co., 65 Fed. R. 257; State v. Port R. & A. Ry. Co., 84 Fed. R. 67. Upon that of the N. C. statute, see Finance Co. v. Charleston, C. & C. Ry. Co., 61 Fed. R. 369; Fidelity Tr. & S. D. Co. v. Norfolk & W. R. Co., 90 Fed. R. 175. As to the Iowa statute, Central Tr. Co. v. Central Ia. Ry. Co., 38 Fed. R. 889. As to the Tennessee statute, Central Tr. Co. v. East Tenn., V. & G. Ry. Co., 70 Fed. R. 764. As to the Vermont statute, Grand T. Ry. Co. v. Central Vt. R. Co., 91 Fed. R. 696. Claims for *damages by fire* to adjoining property caused before the appointment of the receiver have been denied a preference. In re Dexterville M. & R. Co.

[19] In re Kelly v. Receiver of G. B. & M. R. Co., 5 Fed. R. 846, 851, note.

[20] Atkins v. Petersburg R. Co., 3 Hughes, 307; Blair v. St. Louis, H. & K. Ry. Co., 22 Fed. R. 471, 474; Olyphant v. St. Louis O. & S. Co., 22 Fed. R. 179; Taylor v. Phila. & R. R. Co., 7 Fed. R. 377; Thomas v. Cincinnati, N. O. & T. P. Ry. Co., 91 Fed. R. 195; Central Tr. Co. v. Eastern T. & G. R. Co. (C. C. A.), 80 Fed. R. 624.

[21] Fosdick v. Schall, 99 U. S. 235, 238; Hale v. Frost, 99 U. S. 389; Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 308; Virginia & A. Coal Co. v. Central R. & B. Co., 170 U. S. 355, 366. But see Skiddy v. Atlantic, M. & O. R. Co., 3 Hughes, 320.

due eight,[22] and eleven[23] months, and even two years,[24] before the receivership; in one case claims for loans to the amount of more than $3,000,000 advanced upon collateral for the oper-

v. Case, 4 Fed. R. 873; Hiles v. Case, 14 Fed. R. 141; s. c., 9 Biss. 549. *Contra*, Dow v. Memphis & L. R. Co., 20 Fed. R. 260, 266, 267. Claims for the value of *a right of way*, including damages to easements, even when reduced to judgment, are allowed a preference which is analogous to a vendor's lien. Mercantile Tr. Co. v. Pittsburgh & W. R. Co., 29 Fed. R. 732; Central Tr. Co. v. Hennen (C. C. A.), 90 Fed. R. 598; Central Tr. Co. v. Louisville & T. Ry. Co., 81 Fed. R. 772. *Cf.* Wright v. Kentucky & G. E. Ry. Co., 117 U. S. 72; Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 32 Fed. R. 566.

In one case a consolidated mortgage covered leases of branch lines and nearly all of the capital stock of the lessor companies, with a covenant by the trustee that in case of default it would take possession of the mortgaged property and then "operate said railroads and conduct the business . . . and receive all tolls, rents, income and profits from said railroad and other property, . . . and from such rents to pay all expenses of taking possession of said railroads and other property and operating said railroads and conducting said business, . . . and all taxes due upon any of the mortgaged property, and all amounts due for interest or principal of any of the bonds or other obligations of the railway company secured by mortgages or pledges prior in lien to this mortgage; and after deducting such expenses and payments and retaining a reasonable compensation for the services of the trustee in connection with the making of said entry and taking possession of said railroads and other property, and operating the same, and conducting the said business, to apply the net income to the payment of any interest previously due or becoming due during such possession on bonds secured by this mortgage." The trustee further covenanted "to cause all of the railroads and other property thus secured by this mortgage, including all shares of capital stock and bonds held in trust under the provisions hereof, to be sold as one property at public auction," etc. The mortgagor lessee had covenanted to pay *interest* upon the bonds of the lessors of the branch lines as *rent*. The earnings of the branch line were insufficient to pay the rent. It was held that the first covenant constituted a contract by the trustee in case it took possession of the railroads of the mortgagor, either directly or through a receiver, to pay the *interest on the bonds of the branch roads*, as obligations of the mortgagor, before the net income was applied to the payment of interest on the bonds secured by the consolidated mortgage; and that the holders of these bonds had an equity upon the net earnings of the entire system superior to that of the holders of bonds and coupons under the con-

[22] Skiddy v. Atlantic, M. & O. R. Co., 3 Hughes, 320.

[23] Burnham v. Bowen, 111 U. S. 776; Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257, 286.

[24] Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 30 Fed. R. 832, 834, per Brewer, J.; Farmers' L. & Tr. Co. v. Kansas City, W. & N. R. Co., 53 Fed. R. 182, per Caldwell, J. See Atkins v. Petersburg R. Co., 3 Hughes, 307. But see Duncan v. Mobile & O. R. Co., 2 Woods, 542; Addison v. Lewis, 75 Va. 701, 713, 714.

ating expenses of the railroad within two years before the receivership;[25] a claim for materials furnished three years before the appointment, for which a note was given sixteen

solidated mortgage. Mercantile Tr. Co. v. St. Louis & S. F. Ry. Co., 71 Fed. R. 601, 608, 609; s. c. as Mercantile Tr. Co. v. Farmers' L. & Tr. Co. (C. C. A.), 81 Fed. R. 254. But see Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 23 Fed. R. 863. Coupons on bonds of a lessor, due for *rent* when a receiver of the lessee was appointed, were denied a preference in Central Tr. Co. v. Charlotte, C. & A. R. Co., 65 Fed. R. 264. See St. Louis, A. & T. H. R. Co. v. Cleveland, C. & C. I. Ry. Co., 125 U. S. 658. Rent of a terminal property was allowed a preference in Manhattan Tr. Co. v. Sioux City & N. R. Co., 102 Fed. R. 710. Creditors of a lessor railroad were given an equitable lien upon the amount of its earnings collected by the lessee. Terre Haute & I. R. Co. v. Cox (C. C. A.), 102 Fed. R. 825.

Upon the foreclosure of a consolidated mortgage, the court ordered the receivers to pay *interest* upon bonds secured by mortgage upon a vital portion of the system although there was some doubt whether the mortgage foreclosed was not a superior lien. Park v. N. Y., L. E. & W. R. Co., 64 Fed. R. 190. See also Lloyd v. Ches., O. & S. W. R. Co., 65 Fed. R. 351. It was held otherwise, however, in the case of mortgages upon parts of the consolidated road which could be separated from the rest without a serious depreciation. Cleveland, C. & S. R. Co. v. Knickerbocker Tr. Co., 64 Fed. R. 623.

Where the receivers appointed under a consolidated mortgage had paid *interest on prior divisional mortgages*, taxes, operating expenses, debts for equipment, and for that purpose had incurred a preferential indebtedness, it was held: that the consolidated mortgagee could not in the subsequent foreclosure in the same suit of mortgages on different parts of the line have that preferential debt apportioned between its own and the divisional mortgages, or require an accounting of the receipts and disbursements of each division before the extension of the receivership to the divisional mortgages so as to displace in its favor the liens of some of those mortgages; but that these debts were primarily a charge upon the interest of the consolidated mortgagee. N. Y. S. & Tr. Co. v. L., E. & St. L. Con. R. Co., 102 Fed. R. 882.

Under State statutes preferring the claim of persons who perform labor upon the property, the services of a civil engineer who superintended the construction, Central Tr. Co. v. Richmond N. I. & Br. Co., 54 Fed. R. 723; and of a managing agent and a superintendent of trains, who occasionally ran cars, cleaned cars, repaired tracks, and acted as "general utility man," were held to be included, Gilchrist v. Helena, H. S. & S. R. Co., 58 Fed. R. 708; but that of a man who had charge of the office and receipts and entered in a book the time of the workmen as handed in to him was not. Ibid.

In the following cases the *fees of attorneys and counsel* for services immediately before the receivership were allowed a preference: Finance Co. v. Charleston C. & C. Co., 52 Fed. R. 526; Blair v. St. Louis, H. & K. Ry. Co., 23 Fed. R. 521; Louisville, E. & St. L. R. Co. v. Wilson, 138 U. S. 501. Fees for the services of attorneys and counsel have been disallowed a preference where rendered more than a year (Blair v. St. Louis,

[25] Ibid.

months before the receivership;[26] and in one case, those who advanced money, after a default in interest two years before the receivership, to pay the arrears of wages due striking laborers, under a promise from the president of the mortgagor

H. & K. Ry. Co., 23 Fed. R. 521) and more than two years before the receiverships have been disallowed, although the services have increased the value of the property. Finance Co. v. Charleston C. & C. Co., 52 Fed. R. 526. Fees for services performed partly more than six months before the receiverships, but principally within that time, were allowed a preference when they had increased the fund. Louisville, E. & St. L. R. Co. v. Wilson, 138 U. S. 501. When the order of appointment gives a preference to "wages of employees," counsel fees due an attorney who was not employed as general counsel are not included. Louisville, E. & St. L. R. Co. v. Wilson, 138 U. S. 501. But see Gurney v. Atlantic & G. W. Ry. Co., 58 N. Y. 358. An attorney was denied a preference for the payment, at the request of the president of the company, a few weeks before its default, under a promise of reimbursement within a few months, of judgments and other claims against it for wages and injuries to cattle, Blair v. St. Louis, H. & K. Ry. Co., 23 Fed. R. 521; and for the payment as surety upon *appeal bonds* of judgments against the railroad upon claims two or three years old, although the appeals were taken a few months before the appointment of the receiver, and the payment made after that appointment, Blair v. St. Louis, H. & K. Ry. Co., 23 Fed. R. 521; Whiteley v. Central Ir. Co. (C. C. A.), 76 Fed. R. 74; and for services in securing a preference to unsecured creditors, Louisville, E. & St. L. R. Co. v. Wilson, 138 U. S. 501. Preferences have been allowed to sureties upon appeal and replevin bonds given on behalf of a receiver, Union Tr. Co. v. Morrison, 125 U. S. 591; or by a mortgagee in order to save the property, Jones v. Central Tr. Co. (C. C. A.), 73 Fed. R. 568.

Railroad mortgages usually provide for the payment, prior to the bonds, of the fees and expenses of the trustee; but where the inaction of the trustee has compelled the institution of litigation by a bondholder or other person interested, the trustee's counsel fees may be disallowed. So when the services were unnecessary. Bound v. S. C. R. Co., 62 Fed. R. 536. When on account of the inaction of the trustee or otherwise a necessary suit was instituted by a bondholder or other beneficiary to preserve the fund, the counsel fees of the plaintiff may be allowed a preference. Cowdrey v. Galveston, H. & H. R. Co., 93 U. S. 352; Trustees v. Greenough, 105 U. S. 527; Central R. & B. Co. v. Pettus, 113 U. S. 116; *infra*, § 335. The counsel fees of the attorney for the mortgagor cannot be awarded a preference, unless the mortgage so provides. Mercantile Trust Co. v. Missouri, K. & T. Ry. Co., 41 Fed. R. 8, 10; Union Loan & Trust Co. v. Southern Cal. M. R. Co., 51 Fed. R. 106. *Cf.* Mason v. Pewabic Min. Co. (C. C. A.), 66 Fed. R. 391. *Contra*, Bound v. S. C. R. Co., 43 Fed. R. 404. The fees, counsel fees and other debts of a receiver, and a master appointed in a former suit by shareholders or junior incumbrancers, may be allowed a preference. Pennsylvania Co. v. J. T. & K. W. Ry. Co., 93 Fed. R. 60; Reinhart v. Augusta, M. & Inv. Co., 94 Fed. R. 901. *Contra*, Am. L. & Tr. Co. v. South Atl. & O. R. Co., 81 Fed. R. 62. A preference

[26] Hale v. Frost, 99 U. S. 389.

that they would be repaid out of the current earnings of the road: have been given a preference.[27] And by Judge Caldwell: "The debts due from a railroad company for ticket and freight balances, and for work, labor, materials and machinery, fixtures, and supplies of every kind and character done, performed or furnished in the construction, extension, repair, equipment, or operation of said road and its branches in the State of Kansas, and liabilities incurred by said company in the transportation of freight and passengers, including damage to person or property, which have accrued since the execution of the mortgage set out in the bill of complaint," about two years and three months before the receivership,[28] were allowed a preference. A creditor does not lose his preference by taking notes of the railroad company for several months;[29] nor by renewing the notes after the receiver's appointment;[30] nor by reducing his claim to judgment, even though the judgment is entered pending the receivership in a suit begun previously.[31] The recovery of a judgment after a receivership does not, of itself, entitle the plaintiff to a preference over other creditors.[32] An

was denied to so much of a judgment as included costs incurred before the receivership. Williams v. Groat, 73 Fed. R. 59. The claim of a secretary for a balance of salary due him within the prescribed time has been thus preferred. Olyphant v. St. Louis O. & S. Co., 22 Fed. R. 179. But see Wells v. Southern Min. Ry. Co., 1 Fed. R. 270; Addison v. Lewis, 75 Va. 701, 712, 713; Union L. & T. Co. v. Southern Cal. M. R. Co., 51 Fed. R. 106. No case as yet extends the preference to the salary of a president. Nat. Bank of Augusta v. Carolina, K. & W. R. Co., 63 Fed. R. 25. A president forfeits any right he may possess to such a preference by publishing in the annual report a statement that his salary has been paid. Addison v. Lewis, 75 Va. 701, 713. A contract for future employment is not binding on the receiver. Keeler v. Atchison, T. & S. F. R. Co., 92 Fed. R. 545.

[27] Atkins v. Petersburgh R. Co., 3 Hughes, 307.

[28] Farmers' L. & Tr. Co. v. Kansas City, W. & N. R. Co., 53 Fed. R. 182, 184.

[29] Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257, 286; Burnham v. Bowen, 111 U. S. 776; Central T. R. Co. v. Texas & St. L. Ry. Co., 23 Fed. R. 703. Preferences were refused where notes were originally taken for six months, with the right of renewal for the same term, and the payment had been extended for more than five years, Lackawanna I. & C. Co. v. Farmers' L. & T. Co., 176 U. S. 298, 317; and where the notes were indorsed by a third party upon whose credit the money or supplies were advanced. Continental Tr. Co. v. Toledo, St. L. & K. C. R. Co., 93 Fed. R. 532.

[30] Burnham v. Bowen, 111 U. S. 776.

[31] Central Tr. Co. v. Clark (C. C. A.), 81 Fed. R. 269.

[32] Mercantile Tr. Co. v. So. State L. & Tr. Co., 86 Fed. R. 711; Williams v. Groat, 73 Fed. R. 59.

assignee of a preferred claim has all the rights of his assignor;[31] but usually a guarantor who pays a debt has no more right to a preference than the original creditor.[32] A purchaser under a decree which provides for the payment of preferred claims cannot contest their right to a preference;[33] and upon their payment he is not entitled to be subrogated to the rights of the claimants.[34] Where payment had been made on account of advances, some of which were entitled to a preference and some not, it was held that in the absence of a prior application by the parties, the mortgagee could procure their application upon the preferred claims.[35] It has been held that pending a receivership in a Federal court, where parties are entitled to a lien, and can secure it by proceedings under a State statute, they are not required to go to the expense of such proceedings, but the Federal court will treat it as though all needful steps had been taken to establish the lien;[36] and that "where like demands are presented from other States in which

[31] Union Tr. Co. v. Walker, 107 U. S. 596; Burnham v. Bowen, 111 U. S. 776. Where, before the appointment of a receiver, a bondholder accepted a compromise which scaled down the indebtedness; in pursuance thereof surrendered his bonds, under an agreement to receive in exchange new bonds secured by a subsequent mortgage; and did receive enough to replace the greater part of those which he surrendered; but there were a few for which no new bonds issued, apparently because none were engraved for so small an amount,— it was held that his unadjusted claim for this balance remained secured by the old mortgage, and was superior to those under the subsequent mortgage given to secure the new bonds. Blair v. St. Louis, H. & K. Ry. Co., 23 Fed. R. 524. But where rails had been sold to an individual upon his own credit for the use of the railroad by its lessee, a preference against the interest of the lessor was denied. Ruhlender v. Ches., O. & S. W. R. Co. (C. C. A.), 91 Fed. R. 5. For a case where it was held that a party who paid a preferred claim became an equitable assignee of the preference, see Kneeland v. Luce, 141 U. S. 491. For one where it was held that he did not, see U. S. Tr. Co. v. Western C. Co. (C. C. A.), 81 Fed. R. 454.

[32] Farmers' L. & Tr. Co. v. Stuttgart & A. R. Co., 92 Fed. R. 246; Blair v. St. Louis, H. & K. Ry. Co. (Norton, Intervenor), 23 Fed. R. 523. But see Union Tr. Co. v. Morrison, 125 U. S. 591.

[33] Swann v. Wright's Ex'r, 110 U. S. 590; St. Louis S. W. Ry. Co. v. Stark, 55 Fed. R. 758; *infra*, §§ 316, 482; Laughlin v. U. S. Rolling Stock Co., 64 Fed. R. 25.

[34] Morgan's L. & T. R. & S. S. Co. v. Moran, 91 Fed. R. 22.

[35] Illinois T. & S. Bank v. Ottumwa El. Ry. Co., 89 Fed. R. 235.

[36] Brewer, J., in Central Tr. Co. v. Texas & St. L. Ry. Co., 23 Fed. R. 673, 674, 675: Treat, J., in Blair v. St. Louis, H. & K. R. Co., 19 Fed. R. 861. But see Hassall v. Wilcox, 130 U. S. 493.

no statutory lien therefor exists, they shall be entitled to the same *status*, so that statutory and equitable liens may rest on a like basis."[37] A claimant to a preference of a class for which no provision has been made by a previous order or decree cannot regularly apply upon a motion, but he must plead his claim in a petition for an intervention.[38] The attorneys of both the receiver and the complainant should have notice of the hearing of such a claim before a master.[39] An entry upon the books of the mortgagor showing the claim to be good is, in the absence of suspicious circumstances, *prima facie* proof.[40] An order directing a receiver to carry out his corporation's contracts does not necessarily give those who claim damages for a breach of those contracts a preference over lien-holders.[41] Whether this doctrine applies to the foreclosure of any mortgage except those made by railway, telegraph, or other companies to which are delegated the right of eminent domain, is very doubtful.[42] It applies to a mortgage made by an electric-light company.[43] It has been extended to a receivership of a mine.[44]

§ 244. Property over which receivers may be appointed. A receiver may be appointed to preserve and take possession of every kind of property, whether the same be what is termed corporeal or incorporeal, which can be seized by execution at law or which constitutes equitable assets.[1] Thus receivers have been appointed to collect and hold the profits of a rec-

[37] Treat, J., in Blair v. St. Louis, H. & K. R. Co., 19 Fed. R. 861, 862.

[38] Grand Trunk Ry. Co. v. Central Vt. R. Co., 91 Fed. R. 561.

[39] Blair v. St. Louis, H. & K. R. Co., 19 Fed. R. 861, 862.

[40] Blair v. St. Louis, H. & K. R. Co., 19 Fed. R. 861, 862, Treat, J.; s. c., 22 Fed. R. 471, 472, Brewer, J.

[41] Olyphant v. St. Louis O. & S. Co., 28 Fed. R. 729.

[42] Wood v. Guarantee Tr. & S. D. Co., 128 U. S. 416; Raht v. Attrill, 106 N. Y. 423; Reyburn v. Consumers' Gas, F. & L. Co., 29 Fed. R. 561; Fidelity I. & S. D. Co. v. Shenandoah Iron Co., 42 Fed. R. 872; Seventh Nat. Bank v. Shenandoah Iron Co., 35 Fed. R. 436. In Hanna v. State Trust Co. (C. C. A.), 70 Fed. R. 2, a receiver of a land company was authorized to issue certificates to raise money to pay taxes, but not to carry out contracts with purchasers and continue the business.

[43] Illinois Tr. & Sav. Bank v. Ottumwa El. Ry. Co., 89 Fed. R. 235.

[44] Reinhart v. Augusta M. & I. Co., 94 Fed. R. 901.

§ 244. [1] Davis v. Gray, 16 Wall. 203, 217; Davis v. Duke of Marlborough, 2 Swanst. 108, 127; Blanchard v. Cawthorne, 4 Sim. 566. See Palmer v. Vaughan, 3 Swanst. 173; Meriwether v. Garrett, 102 U. S. 472, 501.

tory,[2] of a college fellowship,[3] of a patent for an invention,[4] of the offices of a master forester in a royal forest,[5] and of a county clerk of peace;[6] of the tolls of a turnpike;[7] to manage and collect the profits of mines,[8] plantations,[9] a theatre,[10] a newspaper,[11] a hotel,[12] a ship,[13] a line of telegraph,[14] and a railroad;[15] to exercise the right to sell a conditional right of membership in an exchange;[16] and to take possession of the estate of an intestate with power to apply for letters of administration.[17] After the repeal of the charter of the city of Memphis, a receiver was appointed to take possession of all its property which could be subjected to the payment of its debts.[18] But the Supreme Court has refused to direct such a receiver to levy taxes,[18] or to collect those already levied.[19]

[2] Silver v. Bishop of Norwich, 3 Swanst. 112; White v. Bishop of Peterborough, 3 Swanst. 109.

[3] Feistel v. King's College, 10 Beav. 491.

[4] Parkhurst v. Kinsman, 2 Blatchf. 78.

[5] Blanchard v. Cawthorne, 4 Sim. 566.

[6] Palmer v. Vaughan, 3 Swanst. 173.

[7] Knapp v. Williams, 4 Ves. 430, note; Dumville v. Ashbrooke, 3 Russ. 98, note.

[8] Jefferys v. Smith, 1 J. & W. 298.

[9] Morris v. Elme, 1 Ves. Jr. 139.

[10] Const v. Harris, T. & R. 496, 528.

[11] Chaplin v. Young, 6 L. T. (N. S.) 97; Kelley v. Hutton, 17 W. R. 425.

[12] Raht v. Attrill, 106 N. Y. 423; Cater v. Woodbury, 3 App. D. C. 60.

[13] Cronenwett v. Boston & A. Tr. Co., 95 Fed. R. 52. In this case the receiver, who had been appointed under a creditor's bill against an insolvent corporation, was directed to distribute the insurance money after the vessel's loss in accordance with the priorities that would be recognized by a court of admiralty.

[14] United L. Tel. Co. v. Boston S. D. & T. Co., 147 U. S. 431.

[15] Stevens v. Davison, 18 Grat. (Va.) 819; Davis v. Gray, 16 Wall. 203; Barton v. Barbour, 104 U. S. 126; *infra*, § 246. Before the passage of a statute allowing it to be done, the English court held that a receiver could not be appointed to manage a railroad, Gardner v. London, C. & D. Ry. Co., L. R. 2 Ch. App. 201; but such an appointment is authorized without statutory authority in this country, and even in England a receiver might always be appointed to receive the tolls of a railroad. Hopkins v. W. & B. C. Co., L. R. 6 Eq. 437; Jones on Railroad Securities, § 456. A lugubrious picture of the result of such appointments was drawn by Miller, J., in Barton v. Barbour, 104 U. S. 126, 137, 138. See also the language of the Governor of Texas quoted in Mercantile Tr. Co. v. Texas & P. Ry. Co., 51 Fed. R. 529, 533, 537.

[16] Powell v. Waldron, 89 N. Y. 328; In re Ketchum, 1 Fed. R. 840; In re Werder, 15 Fed. R. 789; Hyde v. Woods, 94 U. S. 523; Platt v. Jones, 96 N. Y. 24.

[17] Re Mayer, L. R. 3 P. & M. 39.

[18] "1. Property held for public uses, such as public buildings, streets, squares, parks, promenades, wharves, landing-places, fire-engines, hose and

[19] Thompson v. Allen County, 115 U. S. 550, 558.

§ 245. Powers of receivers in general.— The powers of a receiver, in the absence of any special authority given in the order for his appointment, are very limited. He can take possession of the property which he is appointed to receive.[1] If any of it is land under lease, he can accept attornment and payment of rent and arrears of rent from the tenants.[2] He can give notice to quit to tenants from year to year;[3] and in States where the remedy by distress still exists, he may distrain for rents not more than one year in arrear.[4] He may also pay out small sums of money in customary repairs of the property which he holds in trust,[5] and in some cases insure it against fire.[6] Beyond this, he can do nothing without the express authority of the court.[7] He cannot sue to recover debts or other property belonging to the estate,[8] nor even, it seems, defend

hose-carriages, engine-houses, engineering instruments, and generally everything held for governmental purposes, cannot be subjected to the payment of the debts of the city. Its public character forbids such an appropriation. Upon the repeal of the charter of the city, such property passed under the immediate control of the State, the power once delegated to the city in that behalf having been withdrawn. 2. The private property of individuals within the limits of the territory of the city cannot be subjected to the payment of the debts of the city, except through taxation. The doctrine of some of the States, that such property can be reached directly on execution against the municipality, has not been generally accepted. 3. The power of taxation is legislative, and cannot be exercised otherwise than under the authority of the legislature. 4. Taxes levied according to law before the repeal of the charter, other than such as were levied in obedience to the special requirement of contracts entered into under the authority of law, and such as were levied under judicial direction for the payment of judgments recovered against the city, cannot be collected through the instrumentality of a court of chancery at the instance of creditors of the city. Such taxes can only be collected under authority from the legislature. If no such authority exists, the remedy is by appeal to the legislature, which alone can grant relief." Chief Justice Waite in Meriwether v. Garrett, 102 U. S. 472, 501. Upon the first three propositions the court was unanimous. The fourth was decided by a majority only. See a criticism of this case by Judge Baxter in Garrett v. City of Memphis, 5 Fed. R. 860.

§ 245. [1] Daniell's Ch. Pr. (3d Am. ed.) 1987, 1988.

[2] Codrington v. Johnstone, 1 Beav. 520; McDonnell v. White, 11 H. L. C. 570.

[3] Doe v. Reed, 12 East, 57, 59.

[4] Pitt v. Snowden, 3 Atk. 750; Brandon v. Brandon, 5 Madd. 473; Davis v. Gray, 16 Wall. 203, 218.

[5] Atty. Gen. v. Vigor, 11 Ves. 563; Daniell's Ch. Pr. (2d Am. ed.) 1990.

[6] Thompson v. Phœnix Ins. Co., 136 U. S. 287, 293, 294; Brown v. Hazlehurst, 54 Md. 26, 28.

[7] Davis v. Gray, 16 Wall. 203, 218; Smith v. McCullough, 104 U. S. 25, 29.

[8] Wynne v. Lord Newborough, 1 Ves. Jr. 164; s. c., 3 Brown, Ch. C.

suits or actions brought against him,[9] nor spend any money whatever which belongs to the estate, except such very small sums as are above referred to,[10] without an order authorizing him to do so. If, however, he does any of these things without leave, and the court determines that the money thus expended has been beneficial to the estate, his expenditures for that purpose may be allowed him;[11] otherwise, he must make good all loss thereby occasioned.[12] It seems that an unauthorized contract made by him with a stranger may be ratified by an order of the court made before the stranger has given notice of his intention to abandon it.[13] A fire insurance company which has received a premium from a receiver cannot in an action on the policy dispute his authority to insure the property he holds;[14] but it has been held that the holder of a note assigned to him by receivers after it was due, could not recover its amount unless he proved that the court had authorized the assignment.[15] It seems that an order giving a receiver authority to sell carries with it authority to execute and deliver to the purchaser a deed;[16] but if not, a subsequent confirmation by the court of a sale irregularly made validates from that time a deed previously executed by the receiver.[17] It has been said that "a purchaser under a deed from a receiver is not bound to examine all the proceedings in the case in which the receiver is appointed. It is sufficient for him to see that there is a suit in equity, or was one, in which the court appointed a receiver of property; that such receiver was authorized by the court to sell the property; that a sale was made under such authority; that the sale was confirmed by the court; and that the deed accurately recites the property or interest thus sold. If the title of the property was vested in the receiver by an order of the court, it would in that case pass to

88; Green v. Winter, 1 J. Ch. (N. Y.) 60.

[9] Swaby v. Dickon, 5 Sim. 629.

[10] Atty. Gen. v. Vigor, 11 Ves. 563.

[11] Tempest v. Ord, 2 Meriv. 55; Blunt v. Clitherow, 6 Ves. 799; Thompson v. Phœnix Ins. Co., 136 U. S. 287, 294.

[12] Atty. Gen. v. Vigor, 11 Ves. 563.

[13] Koontz v. Northern Bank, 16 Wall. 196; Smith v. McCullough, 104 U. S. 25, 29. *Cf.* Girard L. A. & Tr. Co. v. Cooper, 51 Fed. R. 832.

[14] Thompson v. Phœnix Ins. Co., 136 U. S. 287, 294, 295.

[15] The Clara A. M'Intyre, 94 Fed. R. 552.

[16] Koontz v. Northern Bank, 16 Wall. 196, 201.

[17] Koontz v. Northern Bank, 16 Wall. 196.

the purchaser. He is not bound to inquire whether any errors intervened in the action of the court, or irregularities were committed by the receiver in the sale, any more than a purchaser under execution upon a judgment is bound to look into the errors and irregularities of a court on the trial of the case, or of the officer in enforcing its process."[18] An order authorizing a receiver to borrow money to expend in building an unfinished portion of a railroad does not authorize him to contract for municipal aid in such construction.[19] An order authorizing a receiver to make a contract is construed strictly in favor of the estate.[20] After the execution of a contract has been authorized by the court, the order will not ordinarily be revoked except in case of fraud.[21] A receiver cannot accomplish by estoppel or waiver what he has no power to do directly.[22] Without authority from the court a receiver cannot by receipt of rent or otherwise bind the parties or a subsequent purchaser to recognize a lease.[23] The court may, however, either in the original order of appointment or subsequently, give a receiver very extensive powers. It is usual in the order appointing a receiver to give him power to bring and defend suits or actions affecting the estate. Other and much more extensive authority, such as to borrow money needed for the proper administration of his trust, and issue as security therefor certificates giving their owner a first lien upon the estate;[24] to contract for the construction of a bridge;[25] to pay a faithful and deserving employee his wages during the time that he is kept from work by the result of an injury received while at work

[18] Mr. Justice Field in Koontz v. Northern Bank, 16 Wall. 196, 202.

[19] Smith v. McCullough, 104 U. S. 25, 29.

[20] Farmers' L. & Tr. Co. v. Logansport, C. & S. W. Ry. Co., 4 Fed. R. 184.

[21] Wabash, St. L. & P. Ry. Co. v. Central Trust Co., 22 Fed. R. 269. But see Weeks v. Weeks, 106 N. Y. 626.

[22] Van Dyck v. McQuade, 85 N. Y. 616; Farmers' L. & Tr. Co. v. Chicago & A. Ry. Co., 44 Fed. R. 653, 659. But see Central Tr. Co. v. Ohio Central R. Co., 23 Fed. R. 306; Armstrong v. Armstrong, L. R. 12 Eq. 614; Koontz v. Northern Bank, 16 Wall. 196; Stanton v. Ala. & C. R. Co., 31 Fed. R. 585.

[23] Farmers' L. & Tr. Co. v. Chicago & A. Ry. Co., 44 Fed. R. 653, 659.

[24] Wallace v. Loomis, 97 U. S. 146; *infra*, § 247. An order directing the receiver of a hotel to carry on and manage the business of the hotel as previously carried on, was held to authorize him to incur the customary debts in carrying on that business. Cate v. Woodbury, 3 App. D. C. 60.

[25] La Crosse Railroad Bridge, 2 Dill. 465.

for the receiver, without contributory negligence, but for which the receiver is not responsible;[26] and in Ireland, to spend money in relieving and giving employment to poor tenants, for the reason that they may be enabled in the future to pay their rent more regularly,[27] have been given to receivers. The order appointing a receiver of land usually contains a clause empowering him to set and let the same.[28] Even with this, it seems that without special authority he cannot let any part thereof so as to bind the estate for a longer period of time than is authorized by the Statute of Frauds,[29] but that a lease made for a longer time would bind a tenant who had accepted it.[30] It is doubtful whether a receiver has the right to use a patent under a license given the person over whose estate he was appointed.[31] A receiver of a dissolved corporation may sustain a bill to compel the assignment to him of a patent by the legal owner when the corporation had the equitable title to the same.[32] The court may authorize a receiver of a corporation to make any contract within the corporate powers, provided, at least, that it does not bind the property after the receivership is terminated.[33]

§ 246. Powers of receivers of railroads.— Very extensive powers are often granted to the receivers of railroads.[1] And in a carefully considered opinion, Mr. Justice Bradley said: "It

[26] Missouri Pac. Ry. Co. v. Texas & P. Ry. Co., 33 Fed. R. 701; s. c., Blaener, Intervenor, 41 Fed. R. 319, limited by Thomas v. East Tenn., V. & G. Ry. Co., 60 Fed. R. 7.

[27] Jackson v. Jackson, 2 Hogan, 238.

[28] Daniell's Ch. Pr. (2d Am. ed.) 1989.

[29] Kerr on Receivers (2d Am. ed.), 210, 211.

[30] Dancer v. Hastings, 4 Bing. 2; Kerr on Receivers (2d Am. ed.), 211.

[31] Compare Montross v. Mabie, 30 Fed. R. 234, with Curran v. Craig, 22 Fed. R. 101.

[32] McCulloh v. Association Horlogerie Suisse, 45 Fed. R. 479.

[33] South Carolina & G. R. Co. v. Carolina C. E. & C. Ry. Co. (C. C. A.) 93 Fed. R. 543, 553. Where the board of directors may assess the stockholders, the receiver may be empowered to do the same. Maxwell v. Akin, 89 Fed. R. 178.

§ 246. [1] Davis v. Gray, 16 Wall. 203, 219, 220; Cowdrey v. Railroad Co., 1 Woods, 331, 336. See Railroad Receivers in Federal Courts, by Judge Caldwell, 44 Am. Law Rev. 161. Where an order appointing a receiver of a railroad company directed that "all the books, vouchers and papers touching the operation of the railroad," and "all and every part of the properties, interest, effects, moneys, receipts, earnings" of the railroad, should be delivered to the receiver, held, that the order included the company's seal and all records of its past transactions and books relating to its previous history. American Const. Co. v. Jacksonville, T. & K. W. Ry. Co., 52 Fed. R. 937. The re-

may be laid down as a general proposition, that all outlays made by the receiver in good faith, in the ordinary course, with a view to advance and promote the business of the road, and to render it profitable and successful, are fairly within the line of discretion which is necessarily allowed to a receiver intrusted with the management and operation of a railroad in his hands. His duties, and the discretion with which he is invested, are very different from those of a passive receiver, appointed merely to collect and hold moneys due on prior transactions, or rents accruing from houses and lands. And to such outlays in ordinary course may properly be referred, not only the keeping of the road, buildings, and rolling stock in repair, but also the providing of such additional accommodations, stock, and instrumentalities as the necessities of the business may require, always referring to the court, or to the master appointed in that behalf, for advice and authority in any matter of importance, which may require a considerable outlay of money in lump; and except in extraordinary cases, the submission by the receiver of his accounts to the master at frequent intervals, whereby the latter may ascertain from time to time the character of the expenditures made, and disallow whatever may not meet with his approval, will be regarded as a sufficient reference to the court for its ratification of the receiver's proceedings. In extraordinary cases, involving a large outlay of money, the receiver should always apply to the court in advance and obtain his authority for the purchase or improvement proposed."[2]

ceiver appointed in a suit to foreclose a railway mortgage has no right to collect or retain moneys earned by the railroad before his appointment, although paid subsequently to such appointment; where the mortgage contains a clause allowing the mortgagor to remain in possession and collect and use its revenues before default, and the receiver does not represent judgment creditors. Hook v. Bosworth, 64 Fed. R. 443, 449.

[2] Cowdrey v. Railroad Co., 1 Woods, 331, 336. This language has been thus construed in a case in a State court: "This rule, it will be observed, simply prescribes what expenditures, out of the fund in his hands as receiver, the court will recognize as legitimate and proper when the receiver comes to account for the administration of his trust, but nothing here said gives the slightest support to the notion that the receiver may, in virtue of the power of his office, make a contract, without the authority of the court, which will bind the trust, or which the court will be bound to recognize without regard to its necessity or propriety. A receiver may, undoubtedly, appropri-

It has been held that the receiver is not obliged to obtain special authority from the court to make contracts for ordinary supplies or accommodations needed for the operation of the railroad; such as equipment, repairs, the use of the roundhouses and terminals, and the employment of an agent to solicit business; and that such contracts, although subject to review by the court, will not be set aside unless the charges are unreasonable, unusual, or extravagant.[3] The receiver is justified in paying such claims for the loss of freight upon proof by the affidavits of the shippers without any application to the court, where that is the usual course of business by railway and express companies.[4] A loan to a receiver whom the court has not authorized to borrow money will be denied priority.[5] A receiver cannot make a permanent traffic agreement without the authority of the court.[6] It has been held that the court has power to authorize the receiver of a railroad company under proceedings for a foreclosure, to ratify a contract previously made by the corporation giving a telegraph company certain privileges upon its road; and that the contract thus ratified will be binding upon purchasers of the railroad at a foreclosure sale;[7] that such a receiver may be authorized to complete the construction of a line of railroad, and to borrow money for that purpose,[8] to purchase a lien upon part of its property, and

ate moneys in his hands belonging to the trust to such purposes, connected with the trust, as he may think proper, always taking the risk that the court will finally approve his action, but he has no authority to bind the trust by contract without the authority of the court. Until his contracts are approved or ratified by the court, the court is at liberty to deal with them as to it shall appear to be just, and may either modify them or disregard them entirely. This, in my judgment, is the only safe rule which can be adopted." Van Fleet, V. C., Lehigh Coal & Nav. Co. v. Central R. of N. J., 35 N. J. Eq. 426, 429. To a similar effect is Union Tr. Co. v. Ill. Mid. Ry. Co., 117 U. S. 434.

[3] South Carolina v. Port Royal & A. Ry. Co., 89 Fed. R. 565, 572, 574.

[4] Central Tr. Co. v. Colorado Mid. Ry. Co., 89 Fed. R. 560, 564.

[5] Union Tr. Co. v. Ill. Mid. Ry. Co., 117 U. S. 434, 477.

[6] Investment Co. of Phila. v. Ohio & N. W. Ry. Co., 4 Fed. R. 878.

[7] W. U. Tel. Co. v. Atl. & Pac. Tel. Co., 7 Biss. 367.

[8] Kennedy v. St. P. & P. Ry. Co., 2 Dill. 448; *infra*, § 247. See also Smith v. McCullough, 104 U. S. 25; Allen v. D. & W. R. Co., 3 Woods, 316. It has been held that a railroad receiver may be authorized to pledge securities which are the property of the corporation as collateral for a loan, and to incur liability for the expenses of a scheme to refund the corporate indebtedness. Clarke v. Central R. & B. Co., 54 Fed. R. 556.

to assume a lease of a connecting railway,[9] even without notice to the mortgagee.[10] Without authority from the court a re-

[9] Farmers' L. & Tr. Co. v. Burlington & S. W. Ry. Co., 32 Fed. R. 805. See also Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 34 Fed. R. 259; Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 23 Fed. R. 863; Easton v. Houston & T. C. Ry. Co., 38 Fed. R. 784. The rules which should regulate a receivership of a consolidated railroad holding leased lines with separate mortgages upon the different branches, as well as a general mortgage upon the whole system, were thus stated in an opinion of Judge Brewer, delivered when denying an application by a receiver of such a system of railroads for leave to reject such leased roads as were unprofitable: "This Wabash road is composed of many subdivisions. While it is a single corporation today, yet into it have passed many corporations and many separate railroad properties. In administering such a consolidated property, the court must look at, not merely the interest of the mortgagee in this general mortgage, or of the mortgagor as a single entity or corporation, but also the separate and sometimes conflicting interests of the various subdivisions and their respective incumbrances, and, back of all that, the duty which every railroad corporation owes to the public. For underlying the rule which the Supreme Court has laid down in respect to the payment, by receivers when they take possession of the railroad property, of prior unsecured debts recently accrued, runs the thought, as expressed by the Supreme Court, that a railroad corporation owes a duty to the public, which has given it its franchise and enabled it to construct its road,— the duty of operating that road for the benefit of the public. While that may not be what you call an absolute duty, enforceable under all circumstances, it is still a duty to be regarded and enforced by the courts when they take possession of railroads through their officers. And that duty is not limited to the operation of merely that particular fragment of a road which is pecuniarily profitable in its operations, but it extends to the road as an entirety, and to all its branches,— all its parts; differing in that particular from the duty which would rest upon the court if it had simply taken possession of property used for private purposes, manufacturing or otherwise, where the single question might well be said to be one of pecuniary profit. This Wabash road, as a system, was in operation, a going concern, from one end to the other; as such, discharging its duties as best it could to its various creditors. This court, at the instance of the corporation, and to preserve the integrity of the system, took possession of it by its receivers. It took possession of it as a going concern, and, so far as is reasonable and practicable, it should continue it as a going concern until it surrenders it to whoever may be the purchasers or future holders of it. With that preface, and calling these separate branches which have passed into this consolidated road, subdivisions, since some have passed in by way of lease and others by way of consolidation, subject to separate mortgages, we pass orders substantially as follows: The first is one which has already been entered, and we simply emphasize it by repeating it, that subdivisional accounts must be kept separately. That was an

[10] Mercantile Tr. Co. v. Mo., K. & T. Ry. Co., 41 Fed. R. 8, 11, 12.

ceiver of a railroad cannot lease offices for a term of four years.[11] Such authority is not included in the grant of power to make all contracts that may be necessary in carrying on the business of the railroad,[12] nor is the lease ratified by the approval of monthly accounts showing payment of rent under the lease.[13]

§ 247. Receiver's certificates.— Where it is absolutely necessary to raise money for the preservation of the property in his hands, a receiver may be empowered by the court to issue certificates which give their owners a lien upon the property

order passed by Brother Treat at the very outset of this receivership, in order that the particular equities of each one of these divisions, as between themselves, might be ascertained. 2. Where any subdivision earns a surplus over expenses, the rental or subdivisional interest will be paid to the extent of the surplus, and only to the extent of the surplus. Any part diversion of such surplus for general operating expenses will be made good at once, and, if need be, by the issue of receiver's certificates. . . . 3. Where a subdivision earns no surplus,—simply pays operating expenses,—no rental or subdivisional interest will be paid. If the lessor or the subdivisional mortgagee desires possession or foreclosure, he may proceed at once to assert his rights. While the court will continue to operate such subdivision until some application be made, yet the right of a lessor or mortgagee whose rent or interest is unpaid to insist upon possession or foreclosure will be promptly recognized. That, it is true, may work a disruption of the system, as evidenced by the movement just made in respect to this Cairo division; but the proceeding for disruption will come from the subdivisions. The court is not sloughing off branches, tearing the system in two; but the disruption, if it comes, will come from those who seek separation, and have a legal right so to do. 4. Where a subdivision not only earns no surplus, but fails to pay operating expenses, as in the St. Joseph & St. Louis branch, the operation of the subdivision will be continued, but the extent of that operation will be reduced with an unsparing though a discriminating hand; that is, if a subdivision does not earn operating expenses, and the receivers are running two trains a day, then lop one of them off. If they are running one train a day, and still it does not pay, then run one train in two days. While the court will endeavor to keep that subdivision in operation, it will make the burden of it to the consolidated corporation, and to all the other interests put into that consolidated corporation, a minimum." Treat, J., concurring, in Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 28 Fed. R. 868, 865–867. In the same case, Judge Woods subsequently rejected a claim to a preference over the mortgage for rents accrued pending a receivership, in a suit in which the mortgagee had been denied the extension of the receivership for his benefit. Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 46 Fed. R. 26. But see Mercantile Tr. Co. v. Farmers' L. & Tr. Co. (C. C. A.), 81 Fed. R. 254; *supra*, § 243, note 18. *Cf. infra*, § 751.

[11] Chicago Deposit Vault Ry. Co. v. McNulta, 153 U. S. 554.

[12] Ibid.

[13] Ibid.

prior to that held by any persons except those whose claims are paramount to the rights of the parties to the suit.[1] Such certificates are usually issued only in suits for the foreclosure of railroad or telegraph mortgages, or mortgages of other public corporations, in order to raise money for repairs, or to defray operating expenses,[2] or to discharge claims having an equitable preference to that of the party at whose instance the receiver was appointed,[3] or to restore to the rightful owners so much of the income as the receiver has improperly applied to the foregoing purposes.[4] In a few cases, receivers have been authorized thus to borrow money in order to complete the construction of railroads, and save from forfeiture land grants and municipal subscriptions.[5] Certificates have been issued to pay interest upon a divisional mortgage prior to that to foreclose which the suit was brought.[6] Where the net earnings of a railroad are sufficient to defray current expenses, the court will not authorize the issue of receiver's certificates merely for the sake of paying interest upon the mortgage under foreclosure.[7] It has been said to be doubtful whether the court has

§ 247. [1] Meyer v. Johnston, 53 Ala. 237; Jerome v. McCarter, 94 U. S. 734; Wallace v. Loomis, 97 U. S. 146; Miltenberger v. Logansport Ry. Co., 106 U. S. 286; Stanton v. Ala. & C. Ry. Co., 2 Woods, 506; s. c., 31 Fed. R. 585; Kennedy v. St. Paul & P. R. Co., 2 Dill. 448; Hoover v. Montclair & G. L. R. Co., 29 N. J. Eq. 4; Coe v. N. J. Mid. Ry. Co., 27 N. J. Eq. 37; Union Tr. Co. v. Illinois Mid. Ry. Co., 117 U. S. 434. For a case where certain property was exempted from the lien, see Third St. & S. Ry. Co. v. Lewis, 79 Fed. R. 196.

[2] Jerome v. McCarter, 94 U. S. 734; Wallace v. Loomis, 97 U. S. 146; Miltenberger v. Logansport Ry. Co., 106 U. S. 286. The issue of receiver's certificates was authorized in the case of a land and irrigation company in order to pay taxes, but not to carry out contracts nor for operating expenses. Hanna v. State Tr. Co. (C. C. A.), 70 Fed. R. 2. The power has been denied in the case of manufacturing companies; Newton v. Eagle & P. Mfg. Co., 76 Fed. R. 418; Laughlin v. U. S. Rolling Stock Co., 64 Fed. R. 25; but see Fidelity I. & S. Co. v. Shenandoah Iron Co., 42 Fed. R. 372; of a mining company, Farmers' L. & Tr. Co. v. Grape Creek Coal Co., 50 Fed. R. 481; and of a building company, Raht v. Attrill, 106 N. Y. 423.

[3] Miltenberger v. Logansport Ry. Co., 106 U. S. 286; Taylor v. Phila. & R. R. Co., 7 Fed. R. 377; Skiddy v. Atlantic, M. & O. R. Co., 3 Hughes, 320.

[4] Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 23 Fed. R. 863.

[5] Kennedy v. St. Paul & P. R. Co., 2 Dill. 448; Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 294, 295. See also Smith v. McCullough, 104 U. S. 25, 29. But see Investment Co. v. Ohio & N. W. R. Co., 36 Fed. R. 48. See Credit Co. v. Arkansas Central R. Co., 15 Fed. R. 446.

[6] Skiddy v. Atlantic, Miss. & O. R. Co., 3 Hughes, 320, 341.

[7] Taylor v. Phila. & R. R. Co., 9 Fed. R. 1.

the power to authorize a receiver to issue car-trust certificates secured by a lien upon the cars which are thus bought, and payable in ten annual instalments.[8] An order authorizing the issue of receiver's certificates to pay "wages and freights due and to become due" does not authorize the issue of a certificate to pay money advanced to pay wages by honoring "store orders."[9] The power of courts of equity to issue receiver's certificates is of modern origin,[10] has been severely criticised,[11] and should be exercised with great reluctance.[12] Without leave from the court, a receiver has no power to pledge the trust estate, nor to make a contract for a loan of money which will bind the estate,[12] or even bind the proposed lender.[14] An order for the issue of receiver's certificates is usually granted only upon notice to all parties in interest.[15] Those who have not received notice may move to set aside the order and to cancel the certificates, if they act as soon as they learn what was done.[16] A very short delay after knowledge that such an order has been granted will estop a party from objecting to the validity of certificates issued in pursuance of it.[17] Receiver's certificates

[8] Ibid.

[9] Fidelity Ins. & S. D. Co. v. Shenandoah I. Co., 42 Fed. R. 372, 377.

[10] The first case seem to have been Meyer v. Johnson (1875), 53 Ala. 237; Coe v. N. J. Mid. Ry. Co., 27 N. J. Eq. 87; Hoover v. Montclair & G. L. Ry. Co., 29 N. J. Eq. 4; Jerome v. McCarter, 94 U. S. 734; Wallace v. Loomis, 97 U. S. 146.

[11] Barton v. Barbour, 104 U. S. 126, 138; Credit Co. v. Arkansas Cent. R. Co., 15 Fed. R. 46. See The Court Management of Railroads by Hon. S. D. Thompson, 27 Am. Law Rev. 481.

[12] Wallace v. Loomis, 97 U. S. 146, 168; Shaw v. Railroad Co., 100 U. S. 605, 612; Taylor v. Phila. & R. R. Co., 9 Fed. R. 1; Credit Co. of London v. Arkansas Cent. R. Co., 15 Fed. R. 46; Street v. Md. Cent. Ry. Co., 59 Fed. R. 25.

[13] Union Tr. Co. v. Ill. Mid. Ry. Co., 117 U. S. 434; Cent. Tr. Co. v. Cincinnati, J. & M. Ry. Co., 58 Fed. R. 500. The court may ratify the loan after it has been made. Elk Fork O. & G. Co. v. Foster (C. C. A.), 99 Fed. R. 495; Ibid., 90 Fed. R. 767.

[14] Smith v. McCullough, 104 U. S. 25, 29.

[15] Ex parte Mitchell, 12 S. C. 83. But see Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 297, 298.

[16] Hervey v. Ill. Mid. Ry. Co., 28 Fed. R. 169. *Cf.* Central T. R. Co. v. Sheffield & B. C. I. & Ry. Co., 44 Fed. R. 526.

[17] Miltenberger v. Logansport Ry. Co., 106 U. S. 286; Union Tr. Co. v. Ill. Midland Ry. Co., 117 U. S. 434; Central Tr. Co. v. Marietta & N. G. R. Co. (C. C. A.), 75 Fed. R. 193; s. c., 75 Fed. R. 209. It was held that notice of an application for receiver's certificates given to a trustee of a mortgage who was not a party to a suit did not make them, when issued, prior to his mortgage, Farmers' L. & Tr. Co. v. Centralia & C. R. Co. (C. C. A.), 96 Fed. R. 636; and that a bondholders' committee empowered to act in

are assignable, but not negotiable.[18] It has been said that the power to issue them is a personal one which the receiver cannot delegate.[19] The holders of receiver's certificates are bound by all subsequent proceedings in the suit, whether or not the same affect their lien and with or without notice.[20]

The purchaser at a judicial sale made subject to the payment of receiver's certificates cannot contest their validity.[21] A receiver is personally responsible for a fraudulent statement in a

matters requisite or necessary for the enforcement and protection of the legal rights of the holders of mortgage bonds had no authority to consent in their behalf to the issue of receiver's certificates with a priority over the mortgage, in order to pay claims not entitled to a preference. Ibid.

[18] Union Tr. Co. of N. Y. v. Chicago & L. H. R. Co., 7 Fed. R. 513; Stanton v. Ala. & C. R. Co., 31 Fed. R. 585; Turner v. Peoria & S. R. Co., 95 Ill. 134; Stanton v. Ala. & C. R. Co., 2 Woods, 506; s. c., 31 Fed. R. 585; Central Nat. Bank v. Hazard, 30 Fed. R. 484. A purchaser of receiver's certificates at par from the receiver without notice of any suspicious facts is not prejudiced by the appropriation of the funds by the receiver for his own use. Mercantile Tr. Co. v. Kanawha & O. Ry. Co., 50 Fed. R. 874. Where a receiver issued a certificate to a person named therein as payee, for negotiation and sale, and the latter never paid over any money on account of it, a purchaser of the certificate at much less than par, who was unable to prove that the person from whom he bought it had paid anything therefor to the person named as payee, was not allowed to receive anything from the receiver on account of the same. Union Tr. Co. v. Chicago & L. H. R. Co., 7 Fed. R. 513. See Stanton v. Ala. & C. R. Co., 31 Fed. R. 585; s. c., 2 Woods, 506. The court has power to pay out of the fund receivers' certificates in the hands of *bona fide* purchasers, although the receivership is dissolved and the bill dismissed. El. Supply Co. v. Put-in-Bay W. L. & Ry. Co., 84 Fed. R. 740.

[19] Union Tr. Co. v. Chicago & L. H. R. Co., 7 Fed. R. 513. But see Ala. Iron & Ry. Co. v. Armiston L. & Tr. Co. (C. C. A.), 57 Fed. R. 25.

[20] Gordon v. Newman, 63 Fed. R. 686; Mercantile T. Co. v. Kanawha & O. Ry. Co. (C. C. A.), 58 Fed. R. 6. But see Sheffield & B. C. I. & Ry. Co. v. Newman (C. C. A.), 77 Fed. R. 787. The order authorizing the issue of receiver's certificates, although *ex parte*, remains in force till set aside; and is not revoked by a reference to determine all claims against the receiver, and a confirmation of a report thereat making no mention of the certificates, when it appears that they were not presented or considered at the reference, and that their holder had no notice of the reference. Mercantile T. Co. v. Kanawha & O. Ry. Co., 50 Fed. R. 874. It has been said that a receiver's certificate payable out of the income is in the nature of a call loan, and that the holder has the right to presume that the receiver will notify him when the loan is to be collected or the money paid. Sage, J., in Mercantile T. Co. v. Kanawha & O. Ry. Co., 50 Fed. R. 874, 878.

[21] Central Nat. Bank v. Hazard, 30 Fed. R. 484; Central T. Co. v. Sheffield & B. C. & I. Ry. Co., 44 Fed. R. 526.

certificate which he issues.[22] In at least one case, the court ordered the receiver to execute a mortgage to secure the receiver's certificates.[23] But, ordinarily, the order for the issue of the certificates provides that they shall constitute a lien upon the property superior to all prior incumbrances, which is sufficient.[24] In one case the order simply stated that the certificates should be payable out of the income of the property, and "be provided for by this court in its final order in said cause, unless paid by the receiver out of the income of said road as aforesaid."[25] Where the order provides that the certificates shall be a first lien on the property, the lien may be enforced by an independent suit,[26] or by a petition in the suit in which they were issued to the court which ordered their issue,[27] or to a court having territorial jurisdiction over a part of the railroad in an ancillary suit.[28] A receiver appointed in a suit for the foreclosure of a second railroad mortgage may be authorized to issue certificates constituting a prior lien to that of the first mortgage, provided the mortgagor is in default as to that, and the first mortgagee is a party to the suit.[29] An order authorizing the issue of receiver's certificates is appealable.[30] A Federal court has no power to enjoin a receiver appointed by a State court from issuing certificates of indebtedness.[31]

§ 248. Advice to receivers.— Receivers may apply to the court for instructions and advice, both generally and in particular cases.[1] "If there are parties in interest, and they have their day in court, the advice may be decisive. But if the matter is *ex parte*, the value of the advice depends largely upon the information and ability of the judge, and is probably binding only on the receivers, for the judge may change his mind on hearing full argument."[2] It has been said, that from the nat-

[22] Bank of Montreal v. Thayer, 7 Fed. R. 622.

[23] Jerome v. McCarter, 94 U. S. 734.

[24] For a good form of an order and a certificate, see Kennedy v. St. Paul & P. R. Co., 2 Dill. 448.

[25] Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 298.

[26] Swann v. Clark, 110 U. S. 602.

[27] Mercantile T. Co. v. Kanawha & O. Ry. Co., 50 Fed. R. 874.

[28] Ibid.

[29] Miltenberger v. Logansport Ry. Co., 106 U. S. 286.

[30] Farmers' L. & T. Co., Petitioner, 129 U. S. 296.

[31] Reinach v. Atlantic & G. W. R. Co., 58 Fed. R. 33.

§ 248. [1] Frank v. Denver & R. G. Ry. Co., 23 Fed. R. 757; Ex parte Koehler, 23 Fed. R. 529; Mo. Pac. Ry. Co. v. Tex. & P. Ry. Co., 31 Fed. R. 862.

[2] Mo. Pac. Ry. Co. v. Texas & P. Ry. Co., 31 Fed. R. 862.

ure of things the court cannot determine how many trains a receiver shall run,[3] nor select his employees,[4] although it may regulate his treatment of them,[5] and his contracts with them,[6] and will listen to their complaints of unfair treatment by him.[7] The courts have, at the request of receivers, instructed them what rates to charge,[8] and directed them not to obey so much of a State statute as impaired the obligation of a contract, where the petition for instructions was filed a month before the act went into operation,[9] and advised a receiver whether he should pay a tax.[10] When a railroad was in the hands of a receiver appointed in a suit to foreclose a mortgage, the court refused to entertain a petition by the mortgagee asking for instructions as to the propriety of postponing a meeting of its stockholders, and for permission to postpone the meeting.[11]

§ 249. Litigation by receivers.— The causes of action which a receiver can enforce are of two kinds,— those which belonged to the estate of which he has charge before it was entrusted to him, and those which have accrued since his appointment. As has been said before, he cannot sue upon either without the leave of the court which appointed him.[1] A suit upon a cause of action which belonged to the estate before his appointment is brought in the name of the legal owner of the estate;[2] unless, as is not uncommon, the order authorizes the receiver to sue in his own name.[3] In the former case, the person whose

[3] Brewer, J., Treat, J., concurring, in Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 23 Fed. R. 863, 867.

[4] Brewer, J., in Frank v. Denver & R. G. Ry. Co., 23 Fed. R. 757, 764.

[5] Frank v. Denver & R. G. Ry. Co., 23 Fed. R. 757, 764; Waterhouse v. Comer, 55 Fed. R. 149.

[6] Waterhouse v. Comer, 55 Fed. R. 149; Platt v. Phila. & R. R. Co., 65 Fed. R. 660. The court refused to permit receivers of a railroad to reduce the wages of the employees and change the terms of their employment without notice to them. Ames v. Union Pac. Ry. Co., 60 Fed. R. 674. A reduction was allowed in U. S. Tr. Co. v. Omaha & St. L. Ry. Co., 63 Fed. R. 737.

[7] Continental Tr. Co. v. Toledo, St. L. & K. C. R. Co., 59 Fed. R. 514.

[8] Ex parte Koehler, 23 Fed. R. 529.

[9] Ibid.

[10] Ledoux v. La Bee, 33 Fed. R. 761.

[11] Taylor v. Phila. & R. R. Co., 7 Fed. R. 881.

§ 249. [1] Wynne v. Lord Newborough, 1 Ves. Jr. 164; s. c., 3 Brown, Ch. C. 88; Green v. Winter, 1 J. Ch. (N. Y.) 60.

[2] Dick v. Struthers, 25 Fed. R. 103; Dick v. Oil-Well S. Co., 25 Fed. R. 105; Daniell's Ch. Pr. (2d Am. ed.) 1977, 1991.

[3] Davis v. Gray, 16 Wall. 203. See Frankle v. Jackson, 30 Fed. R. 398.

name is used is indemnified out of the fund for all costs to which he is thereby made liable.[4] Receivers of corporations are usually authorized to sue and defend in the name of the corporation.[5] Costs recovered against a receiver in an action brought by him in his official capacity, are entitled upon the distribution of the fund to a priority over claims that existed against it before the receiver's appointment.[6] In the conduct of litigation, as in every other proceeding by him, a receiver is under the constant supervision of the court.[7] He is not bound by a stipulation which is not advantageous to the estate, made by himself or his counsel without the sanction of the court.[8] He cannot waive a defense on the merits.[9] He cannot allow a set-off not authorized by law.[10] He may be allowed to discontinue without costs an action honestly but erroneously begun by him.[11] The rights of a receiver are in general no greater than those of the person whose estate he holds.[12] Thus, a receiver of an insolvent corporation appointed in a creditor's suit cannot "enforce a collateral obligation given to a creditor or to a body of creditors by a third person for the

[4] Daniell's Ch. Pr. (2d Am. ed.) 1991.

[5] Frankle v. Jackson, 30 Fed. R. 898; Davis v. Gray, 16 Wall. 203; Harland v. R. & M. Tel. Co., 33 Fed. R. 199; Hale v. Hardon, 89 Fed. R. 283, 287. *Cf.* Wilder v. New Orleans (C. C. A.), 87 Fed. R. 843; Braddock Br. Co. v. Pfandler V. M. Co. (C. C. A.), 106 Fed. R. 604.

[6] Camp v. Receivers Niagara Bank, 2 Paige (N. Y.), 283; Columbian Ins. Co. v. Stevens, 37 N. Y. 536; Locke v. Covert, 42 Hun (49 N. Y. S. C. R.), 484.

[7] Van Dyck v. McQuade, 85 N. Y. 616; McEvers v. Lawrence, Hoff. Ch. (N. Y.) 175.

[8] Van Dyck v. McQuade, 85 N. Y. 616. *Cf.* Vance v. Royal C. Mfg. Co., 82 Fed. R. 251.

[9] McEvers v. Lawrence, Hoffman Ch. (N. Y.) 172; Keiley v. Dusenbury, 10 J. & S. (N. Y. Superior Ct.) 238; s. c., 77 N. Y. 597; Van Dyck v. McQuade, 85 N. Y. 616. A receiver may waive service of process and an objection to the jurisdiction founded upon residence. Whitcomb v. Hooper (C. C. A.), 81 Fed. R. 946. It was held that a receiver who had removed an action brought against him in a State court could not afterwards object that the Federal court had not acquired jurisdiction. Baggs v. Martin, 179 U. S. 206. A receiver is bound by an admission in the litigation made in good faith by the corporation before his appointment. Perry v. Godbe, 82 Fed. R. 141. He is not, however, bound by a promise of his own made before his appointment. Stanton v. Ala. & C. R. Co., 31 Fed. R. 585.

[10] Van Dyck v. McQuade, 85 N. Y. 616. *Cf.* Central Tr. Co. v. Clark (C. C. A.), 81 Fed. R. 269.

[11] St. John v. Denison, 9 How. Pr. (N. Y.) 343; Reeder v. Seely, 4 Cowen, 548; Arnoux v. Steinbrenner, 1 Paige (N. Y.), 82.

[12] Jacobson v. Allen, 12 Fed. R. 454, 457. But see Hart v. Barney & S. Mfg. Co., 7 Fed. R. 548.

payment of the debts of the insolvent;"[13] for example, a statutory liability of stockholders to creditors.[14] It has, however, been said: "It is the settled doctrine that the receiver of an insolvent corporation represents not only the corporation but also creditors and stockholders, and that in his character as trustee for the latter, he may disaffirm and maintain an action as receiver to set aside illegal or fraudulent transfers of the property of the corporation made by its agents or officers, or to recover its funds or securities invested or misapplied."[15] The defendant to an action by the receiver of an insolvent's estate cannot set off claims against the insolvent which have been assigned to him since the application for the receiver's appointment.[16] A receiver has no absolute right to sue in the courts of a sovereignty foreign to that from which he holds his authority.[17] He may sue in a foreign court upon a judgment which he has recovered in the court which appointed him.[18] By comity he is usually allowed to sue in a foreign court,[19] unless by so doing he would interfere with a preference given to domestic creditors by the laws or public policy of the State wherein he brings the action.[20] In this respect, it seems, that a court of the State within which a Federal court is held is considered as foreign to the latter, at least when sit-

[13] Wallace, J., in Jacobson v. Allen, 12 Fed. R. 454.

[14] Jacobson v. Allen, 12 Fed. R. 454.

[15] Andrews, J., in Atty. Gen. v. Guardian M. L. Ins. Co., 77 N. Y. 272, 275. See also Gillet v. Moody, 3 N. Y. 479, 488; Talmage v. Pell, 7 N. Y. 328; Whittlesey v. Delaney, 73 N. Y. 571; National T. Co. v. Miller, 33 N. J. Eq. 155, 158; Jacobson v. Allen, 12 Fed. R. 454, 455.

[16] In re Van Allen, 37 Barb. (N. Y.) 225, 231; Van Dyck v. Quade, 85 N. Y. 616.

[17] Booth v. Clark, 17 How. 322; Brigham v. Luddington, 12 Blatchf. 237; Olney v. Tanner, 10 Fed. R. 101; Hazard v. Durant, 19 Fed. R. 471, 476; Holmes v. Sherwood, 16 Fed. R. 725; s. c., 3 McCrary, 405. In a court that has appointed an ancillary receiver, it will be presumed, in the absence of allegations to the contrary, that a suit there instituted is brought in his ancillary capacity. Sullivan v. Sheehan, 89 Fed. R. 247.

[18] Wilkinson v. Culver, 25 Fed. R. 639. Or to recover land conveyed to him as receiver. Oliver v. Clarke (C. C. A.), 106 Fed. R. 402.

[19] Ex parte Norwood, 3 Biss. 504; Hunt v. Jackson, 5 Blatchf. 349; Cuykendall v. Miles, 10 Fed. R. 342; Chambers v. M'Dougal, 42 Fed. R. 694, 696; Phœnix Ins. Co. v. Schultz (C. C. A.), 80 Fed. R. 337; Hurd v. Elizabeth, 41 N. J. Law (12 Vroom), 1; Bank v. McLeod, 38 Ohio St. 174. But see Booth v. Clark, 17 How. 322; Holmes v. Sherwood, 16 Fed. R. 725.

[20] Booth v. Clark, 17 How. 322; Brigham v. Luddington, 12 Blatchf. 237; Olney v. Tanner, 10 Fed. R. 101; Zacher v. Fidelity Tr. & S. D. Co. (C. C. A.), 106 Fed. R. 593; Hale v. Tyler, 104 Fed. R. 757; *supra*, § 34.

ting in bankruptcy.[21] A substituted trustee can, however, sue in a foreign jurisdiction, even though the trial court that appointed him required him to give a bond and to account to itself in the same manner as a receiver.[22] A receiver is especially favored in the enforcement of causes of action arising after his appointment. He can, upon motion or petition in the suit wherein he is appointed, obtain injunctions to prevent disobedience to contracts made with him,[23] or prevent interference with property in his possession,[24] whether the person enjoined is a party to the suit or not, even if he be a state officer; for example, a tax collector.[25] In nearly every case, interference with a receiver in the discharge of his duties is a contempt of court, even when no injunction expressly forbidding it has been issued.[26] For example, striking laborers have been adjudged guilty of contempt for attempting to prevent employees of a receiver of a railroad from working for him.[27] The court

[21] Olney v. Tanner, 10 Fed. R. 101. But see Chambers v. M'Dougal, 42 Fed. R. 694, 696; Hale v. Hardon, 89 Fed. R. 283; Phœnix Ins. Co. v. Schultz (C. C. A.), 80 Fed. R. 837. In an action in a State court by a receiver of a Federal court it will be presumed that he has duly qualified in accordance with the order for his appointment, if a subsequent order of the Federal court recognizing him as receiver is put in evidence. Hegewich v. Silver, 140 N. Y. 414. See Young v. Wempe, 46 Fed. R. 354.

[22] Glenn v. Soule, 23 Fed. R. 417; Holmes v. Sherwood, 16 Fed. R. 725; s. c., 3 McCrary, 405. *Cf.* Hale v. Hardon, 89 Fed. R. 283, 287, 288.

[23] Walton v. Johnson, 15 Sim. 352.

[24] Angel v. Smith, 9 Ves. 335; Lake Shore & M. S. Ry. Co. v. Felton (C. C. A.), 103 Fed. R. 227.

[25] In re Tyler's Petition, 149 U. S. 164; Ex parte Chamberlain, 55 Fed. R. 704; Ex parte Huidekoper, 55 Fed. R. 709; Ledoux v. La Bee, 83 Fed. R. 761. A sale for taxes without leave of the court is void. Va., T. & C. Steel & I. Co. v. Bristol Land Co., 88 Fed. R. 134. A valid tax upon the assets is, it seems, a prior lien after the judicial costs. Ledoux v. La Bee, 83 Fed. R. 761.

[26] Thompson v. Scott, 4 Dill. 508; Davis v. Gray, 16 Wall. 203, 218.

[27] Secor v. Toledo, P. & W. R. Co., 7 Biss. 513; King v. Ohio & M. Ry. Co., 7 Biss. 529; In re Higgins, 27 Fed. R. 443. "If the testimony makes it clear that when these parties went in such numbers, and conducted themselves in such a way, that while they simply said, 'Please get off this engine,' or 'We want you to get off this engine,' they intended to overawe,—intended, by the demonstrations which they made, to impress upon the minds of the engineers and train-men that personal prudence compelled them to leave,—why, then the government has made out its case. As my brother Treat said in a similar case, that we had before us in St. Louis, a request, under these circumstances, is a threat. Every sensible man knows what it means, and courts are bound to look at things just as they are, to pass upon facts just as they are developed, to treat the conduct of men just as it is, and to impute to them that intention which their acts and their con-

will not enjoin the employees of a receiver from a peaceable strike, unaccompanied by violence or intimidation.[28] He can compel, by a summary proceeding in the court that appointed him, the delivery of property of his estate in the possession of a stranger to the suit who claims no right to its possession.[29] Where a marshal had levied on property previously in the possession of a receiver of a State court, the receiver was allowed to proceed by a rule to take the possession of the same, although the regular practice was an intervention by him.[30] It has been held, however, that the court should not enjoin a stranger to the suit who is a citizen of another State from enforcing legal process in his own State against land there in the possession of the receiver;[31] and a receiver must proceed by an original suit to recover property held by a stranger to the litigation under a claim of title.[32] Since a proceeding to collect assets of an estate, whether brought *in personam* to recover damages, or *in rem*, as by replevin or ejectment, is ancillary to the principal suit, a receiver appointed by a Federal court can bring a suit for that purpose in the court of his appointment irrespective of the citizenship of the parties or the amount involved.[33] He cannot, however, sue out a writ of error from

duct disclose was their intention." Brewer, J., U. S. v. Kane, 23 Fed. R. 748, 751, citing In re Doolittle, 23 Fed. R. 544, 548. And in another case the same judge said: "Now, if a party engaged in a lawful undertaking unintentionally interferes with some of the officers of this court, and obstructs them in the discharge of their duties, this court is not tenacious of any mere prerogative, and would let such action pass almost without notice; but where parties are engaged in that which is of itself unlawful, in doing that which they have no right to do, and in so doing obstruct the officers of the court although intending no contempt, that is a very different thing." Brewer, J., In re Doolittle, 23 Fed. R. 544, 548.

[28] Arthur v. Oakes (C. C. A.), 63 Fed. R. 310; *supra*, § 215.

[29] Miles v. New So. B. & L. Ass'n, 95 Fed. R. 919.

[30] Remington P. Co. v. Louisiana Pr. & Pub. Co., 56 Fed. R. 287.

[31] Schindelholz v. Cullum (C. C. A.), 55 Fed. R. 885.

[32] Davis v. Gray, 16 Wall. 203, 218; Parker v. Browning, 8 Paige (N. Y.), 388; Noe v. Gibson, 7 Paige (N. Y.), 513. Or to collect a claim of the corporation. Eau Claire v. Payson (C. C. A.), 107 Fed. R. 557. A receiver cannot by petition in the suit obtain an injunction against unlawful discrimination by a railroad company which is not a party to the suit. Wood v. N. Y. & N. E. R. Co., 61 Fed. R. 286. Where a receiver took pay for corporate property in stock which he kept himself, crediting his fund with price in cash, *held*, that he could not sue individually for fraudulent representations by the vendor of the stock. Kenedy v. Benson, 54 Fed. R. 886.

[33] White v. Ewing, 159 U. S. 36; Pope v. Louisville, N. A. & C. R. Co., 173 U. S. 573; *supra*, §§ 15, 21.

the Supreme Court of the United States to the judgment of a State court, except in a case where that might be done by an individual.[34] He has the right of appeal from an appealable order or decree of a Federal court which sustains a claim antagonistic to the rights of both parties to the suit, or antagonistic to the rights of either party; subject to the limitation that he may not question any order or decree which distributes burdens, or apportions rights, or distributes the estate in his hands between the parties, or any clause in the order or decree appointing him, or any order or decree resting in discretion.[35] He may appeal from an order or decree which affects his personal rights, such as an order which disallows his fees or commissions; but it seems that he cannot appeal from an order which rests in the discretion of the court; for example, an order which discharges or removes him, or directs him in the administration of the estate, as, for example, to issue receiver's certificates or to make improvements.[36] "His right to appeal from an allowance or claim against the estate does not necessarily fail when his receivership is terminated, to the extent of surrendering the property in the possession of the receiver."[37] Upon an appeal in a suit brought by him, in the absence of any Federal question, the jurisdiction is considered as dependent upon the difference of citizenship in the suit in which he was appointed; and the judgment or decree of the Circuit Court of Appeals is final.[38] A receiver is presumed to represent all parties to the suit, and he cannot object because other parties have no notice of an application duly served on him;[39] although, of course, the court may listen to a suggestion of that nature by him.

[34] Bausman v. Dixon, 173 U. S. 113.

[35] Bosworth v. St. Louis T. R. Ass'n, 174 U. S. 182, 186, 187.

[36] Bosworth v. St. Louis T. R. Ass'n 174 U. S. 182, 189. An order directing the receiver of a railroad to construct and maintain gates and other safeguards at the crossing of another road, in accordance with a contract made between two railroad companies, with covenants running with the land, is not a decree for specific performance, but merely an interlocutory order affecting the administration of the estate from which he cannot appeal. Hunt v. Ill. Cent. Co. (C. C. A.), 96 Fed. R. 644. But see Felton v. Ackerman, 61 Fed. R. 225.

[37] Bosworth v. St. Louis T. R. Ass'n, 174 U. S. 182, 189.

[38] Pope v. Louisville, N. A. & C. Ry. Co., 173 U. S. 573.

[39] McLeod v. New Albany (C. C. A.), 66 Fed. R. 378. As to the right of a creditor to enforce a cause of action owned by a receiver, see Werner v. Murphy, 60 Fed. R. 769; Swope v. Villard, 61 Fed. R. 417.

§ 250. Duties of receivers.— A receiver holds the property of which he is given the care in trust for all persons interested therein, whether parties to the suit or not,[1] provided that they do not claim it by a title paramount to his own.[2] His duties, therefore, are substantially those of a trustee, although his powers are usually more limited; and the decisions concerning the duties and liabilities of trustees, executors, administrators, and assignees in bankruptcy and insolvency are often of service in determining those of a receiver.[3] A receiver's first duty after his appointment is to take possession of the property entrusted him by the order, using all the powers therein given him.[4] If any of it is under lease he should notify the tenants of his appointment and demand that they attorn to him.[5] It seems that as soon as he has obtained possession of all the estate that consists of personal property he should make an inventory thereof.[6] "Under some circumstances a receiver would be derelict in duty, if he did not cause property in his hands to be insured against fire."[7] All moneys that he receives he should either pay into court or deposit in a bank to the credit of himself as receiver, in a separate account from that for his private deposits.[8] In remitting money from one place to another, he may do so by using the ordinary means, provided that he uses due care.[9] He will be personally liable for all loss to the estate caused by his making any other disposition of the funds collected by him.[10] It is advisable for a receiver to take a receipt for all sums of money exceeding twenty dollars paid out by him. By so doing, and by using such receipts as vouchers, he will have less diffi-

§ 250. [1] Davis v. Gray, 16 Wall. 203, 217, 218; Central T. Co. v. Wabash, St. L. & P. Ry. Co., 28 Fed. R. 863.

[2] Davis v. Duke of Marlborough, 2 Swanst. 108, 118, 137, 138; Georgia v. Atlantic & G. R. Co., 3 Woods, 434.

[3] See, for example, Com. v. Franklin Ins. Co., 115 Mass. 278; People v. National T. Co., 82 N. Y. 283.

[4] Daniell's Ch. Pr. (2d Am. ed.) 1987.

[5] Daniell's Ch. Pr. (2d Am. ed.) 1987.

[6] Lewin on Trusts (6th ed., London, 1875), 184; England v. Downs, 6 Beav. 269. See also Williamson v. Wilson, 1 Bland (Md.), 418, 436.

Thompson v. Phœnix Ins. Co., 136 U. S. 287, 293, per Mr. Justice Harlan.

[8] Salway v. Salway, 4 Russ. 60; s. c., 2 R. & M. 215; Wren v. Kirton, 11 Ves. 377; Hinckley v. Railroad Co., 100 U. S. 153, 157. For a case where a receiver was held responsible for money lost by the failure of a bank, see Fikener v. Bott, 47 S. W. R. 251.

[9] Knight v. Lord Plimouth, 3 Atk. 480; s. c., 1 Dickens, 120.

[10] Salway v. Salway, 4 Russ. 60; s. c., 2 R. & M. 215; Rowth v. Howell, 3 Ves. 565.

culty in passing his accounts.[11] A receiver should so keep the estate in his hands that it can easily traced, delivered up, or accounted for.[12] He should, at least as often as once a year, account and pay into court all the money which he has received, together with the profits thereof, less all necessary or authorized expenditures, and such compensation as the court allows him.[13] If he receives a considerable sum of money during the interval between the regular times for his accounting, it seems that he should apply to the court for directions concerning its investment;[14] and in general, he should apply for instructions whenever any unexpected event occurs of which advantage may be taken for the benefit of the estate, or which necessitates active measures to preserve the estate from loss.[15] Any profit which he may make from the estate belongs to the finally successful party, or to him to whom the surplus, after the payment of prior demands, is finally directed to be paid.[16] And if he uses the property over which he has been appointed in his private business, he must pay to the estate for its use.[17] It is usually considered improper for a receiver to retain as his counsel one who has previously acted in the suit for one of the parties.[18] But it is proper for a receiver appointed in a suit brought by a creditor for the satisfaction of his own debt alone, to retain the attorney of the complainant.[19] A receiver of a railroad is a common carrier;[20] he is guilty of impropriety, for which he may be removed, when he discriminates between

[11] Remsen v. Remsen, 2 J. Ch. (N. Y.) 495, 501.

[12] Williamson v. Wilson, 1 Bland (Md.), 18; Hinckley v. Railroad Co., 100 U. S. 153, 157; Atty. Gen. v. North Am. L. I. Co., 89 N. Y. 94, 107, 108.

[13] Daniell's Ch. Pr. (2d Am. ed.) 1992; Shaw v. Rhodes, 2 Russ. 539. See § 256.

[14] Shaw v. Rhodes, 2 Russ. 539; Hicks v. Hicks, 3 Atk. 274; Earl of Lonsdale v. Church, 3 Brown Ch. C. 41.

[15] Shaw v. Rhodes, 2 Russ. 539, Hicks v. Hicks, 3 Atk. 274; Earl of Lonsdale v. Church, 3 Brown Ch. C. 41.

[16] Gibbs v. David, L. R. 20 Eq. 373.

But see Whitesides v. Lafferty, 3 Humph. (Tenn.) 150.

[17] Battaile v. Fisher, 36 Miss. 321.

[18] Ryckman v. Parkins, 5 Paige (N. Y.), 543; Blair v. St. Louis, H. & K. R. Co., 20 Fed. R. 348. In one case the court refused to allow the receiver to retain a relative who had previously practiced elsewhere, and had come into the circuit apparently for the purpose of acting as counsel for the receiver. Blair v. St. Louis, H. & K. R. Co., 20 Fed. R. 348.

[19] Shainwald v. Lewis, 8 Fed. R. 878. See Davis v. Chattanooga U. Ry. Co., 65 Fed. R. 359.

[20] Beers v. Wabash, St. L. & P. Ry. Co., 34 Fed. R. 244.

different persons who use the railway;[21] and he may be obliged to repay such sums of money as he has exacted from shippers of freight by unlawful discriminations against them.[22] A receiver cannot resign without the permission of the court which appointed him.[23] A recent statute provides "that whenever in any case pending in any court of the United States, there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall wilfully violate the provisions of this section shall be deemed guilty of a misdemeanor, and shall on conviction thereof be punished by a fine not exceeding three thousand dollars, or by imprisonment not exceeding one year, or both said punishments, in the discretion of the court."[24]

§ 251. Liability of a receiver.—The liability of a receiver is in many but not all respects analogous to those of a trustee. He is liable to all persons interested in the estate in his hands for any damage resulting to them from any breach of duty by him, whether intentionally[1] or through negligence.[2] It has been held that he is personally responsible for funds of the trust embezzled by his clerks.[3] He is, however, free from liability to the parties to the suit on account of any act performed in obedience to an order of the court within its jurisdiction, and not obtained by fraud, until the same has been vacated upon appeal or otherwise.[4] A receiver's liability to strangers is much more limited than that of a trustee.[5] He is not liable

[21] Handy v. Cleveland & M. R. Co., 31 Fed. R. 689. See Missouri Pac. Ry. Co. v. Texas & P. Ry. Co., 30 Fed. R. 2; Cutting v. Florida Ry. & Nav. Co., 43 Fed. R. 747.

[22] Cutting v. Florida Ry. & Nav. Co., 43 Fed. R. 747.

[23] Daniell's Ch. Pr. (2d Am. ed.) 2002. See In the Matter of Jones, 4 Sandf. Ch. (N. Y.) 615.

[24] 25 St. at L., § 2, p. 436; 24 St. at L., § 2, p. 554. As to the liability of receivers under Federal statutes, see Erb v. Morasch, 177 U. S. 305; U. S. v. De Coursey, 82 Fed. R. 302; U. S. v. St. Louis, A. & T. R. Co., 43 Fed. R. 414.

§ 251. [1] Knight v. Lord Plimouth, 3 Atk. 480, 481; Kaiser v. Kellar, 21 Iowa, 95, 97; Koontz v. Northern Bank, 16 Wall. 196, 202, 203.

[2] Skerrett's Minors, 2 Hog. 192.

[3] Gunn v. Ewan, 93 Fed. R. 80.

[4] Holcombe v. Johnson, 27 Minn. 353.

[5] See Taylor v. Davis, 110 U. S. 330, 335.

personally upon a covenant entered into in his official capacity with the sanction of the court.[6] Although it may be that in the courts of Massachusetts and New York he is personally responsible for rent when he retains possession of a leasehold,[7] the rule of the Federal courts seems to be that he is not liable in such a case, and that the court may authorize him to abandon a leasehold after experience has shown that it is unprofitable to the estate, even after he has retained it for nine months or more; and that then he incurs no personal liability, and the estate is responsible only for the use of the property during the time that he has remained in possession.[8] The same principles apply to a lease of personal property such as railroad cars.[9] A receiver, even when acting as a common carrier, is not liable personally for injuries caused by the negligence of his employees, when he exercised reasonable care in their selection.[10]

[6] Livingston v. Pettigrew, 7 Lans. (N. Y.) 405; Newman v. Davenport, 9 Bax. (Tenn.) 538; Taylor v. Davis, 110 U. S. 330, 335; Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 34 Fed. R. 259.

[7] Com. v. Franklin Ins. Co., 115 Mass. 278; People v. National Tr. Co., 82 N. Y. 283; People v. Univ. L. Ins. Co., 30 Hun (37 N. Y. S. C. R.), 142; Wells v. Higgins, 132 N. Y. 459.

[8] St. Joseph & St. L. R. Co. v. Humphreys, 145 U. S. 105; Ames v. Union Pac. Ry. Co., 60 Fed. R. 966; U. S. Tr. Co. v. Wabash W. Ry. Co., 150 U. S. 287; Seney v. Wabash W. Ry. Co., 150 U. S. 310; Quincy, M. & P. Ry. Co. v. Humphreys, 145 U. S. 82; Kneeland v. Am. L. & Tr. Co., 136 U. S. 89. For cases where it was held that the court had adopted and assumed the lease, see Central R. & B. Co. of Ga. v. Farmers' L. & Tr. Co., 79 Fed. R. 158; Mercantile Tr. Co. v. Atlantic & P. R. Co. (C. C. A.), 88 Fed. R. 140; s. c. as U. S. Tr. Co. v. M. Tr. Co. (C. C. A.), 80 Fed. R. 18; Central T. Co. v. Continental Tr. Co. (C. C. A.), 86 Fed. R. 517; U. S. Tr. Co. v. Mercantile Tr. Co., 88 Fed. R. 140. The question whether the court should adopt the lease was said to be administrative rather than judicial in its nature, and not to be reviewed by an appellate tribunal, unless there were a manifest abuse of discretion. Mercantile Tr. Co. v. Farmers' L. & Tr. Co. (C. C. A.), 81 Fed. R. 254. *Certiorari* denied, 168 U. S. 710.

[9] Sunflower Oil Co. v. Wilson, 142 U. S. 313. *Cf.* Platt v. Phila. & R. R. Co. (C. C. A.), 84 Fed. R. 535; Thomas v. Western Car Co., 149 U. S. 95; Farmers' L. & Tr. Co. v. Chicago, etc. Ry. Co., 42 Fed. R. 6; Easton v. Houston & T. C. Ry. Co., 38 Fed. R. 784. For the effect of other executory contracts by corporations upon their receivers, see Manhattan Tr. Co. v. Sioux City & N. R. Co., 81 Fed. R. 50; Central Tr. Co. v. East Tenn. Land Co., 79 Fed. R. 19.

[10] Kennedy v. I. C. & L. R. Co., 3 Fed. R. 97; Union Tr. Co. v. Chicago & L. H. Ry. Co., 7 Fed. R. 513, 516; Davis v. Duncan, 19 Fed. R. 477; Farmers' L. & Tr. Co. v. Central R. R. of Iowa, 2 McCrary, 181; s. c., 7 Fed. R. 537; Thompson v. No. Pac. Ry. Co., 93 Fed. R. 384, 389. See, however, Kain v. Smith, 80 N. Y. 458.

The only remedy of the person thus aggrieved is by an action against the receiver in his official capacity, seeking satisfaction out of the estate.[11] When the receiver has been discharged and the estate sold, or returned to its owner, he has no remedy in a Federal court except against the employee, unless one has been preserved for him by the court;[12] for the owner of the property is not liable for the negligence of the receiver's employees.[13] For this reason it is customary to insert in the order for the sale in bulk of property in the possession of a receiver, that the purchaser shall take it subject to all claims for injuries caused while it was managed by the receiver.[14] Such a provision, although not mentioned in the order for the sale, may be inserted as a condition in the order confirming the sale, and the purchaser, after taking possession under the latter order, is estopped from disputing the validity of the condition.[15] Such claims are usually enforced in the suit in which the receiver was appointed.[16] By the former practice, following the old chancery rule, a receiver could not be sued without the permission of the court that appointed him.[17] An act of Congress has changed the practice as follows: "Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property,

[11] Kennedy v. I. C. & L. R. Co., 8 Fed. R. 97; Farmers' L. & Tr. Co. v. Central R. R. of Iowa, 2 McCrary, 181; s. c., 7 Fed. R. 537; Union Tr. Co. v. U. & L. H. Ry. Co., 7 Fed. R. 513, 516.

[12] Davis v. Duncan, 19 Fed. R. 477; White v. Keokuk & D. M. Ry. Co., 52 Iowa, 97. For cases where a State court gave a remedy, see Texas & Pac. Ry. Co. v. Johnson, 151 U. S. 81; Texas Pac. Ry. Co. v. Griffin, 76 Tex. 441; Fordyce v. Witters (Texas), 20 S. W. R. 266.

[13] Davis v. Duncan, 19 Fed. R. 477.

[14] Farmers' L. & Tr. Co. v. Central R. R. Co. of Iowa, 2 McCrary, 181; s. c., 7 Fed. R. 537; s. c. subsequently considered in 17 Fed. R. 758.

[15] Farmers' L. & Tr. Co. v. Central R. R. of Iowa, 17 Fed. R. 758.

[16] Ibid.

[17] Barton v. Barbour, 104 U. S. 126. Such an order was revocable and might have been conditional. Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 26 Fed. R. 74. "The leave to bring suit in any form reserves the right to the receiver to set up any defense he may have, which can be done by plea, answer, or demurrer." Davis v. Duncan, 19 Fed. R. 477, 483. See also Jordan v. Wells, 3 Woods, 527. The court might direct that service of process be made upon the resident agent of a non-resident receiver. Central Tr. Co. v. St. Louis, A. & T. Ry. Co., 40 Fed. R. 426. As to the right to inspect a receiver's books, see Chable v. Nicaragua C. C. Co., 59 Fed. R. 846.

without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice."[18] This dispossesses receivers appointed by a Federal court of any right which they might otherwise have to remove suits brought against them from the State to the Federal courts, where no difference of citizenship exists and no Federal question is involved.[19] It has been held that this statute makes the judgment in the State court in such an action conclusive as to the right of the plaintiff therein to recover damages, and as to the amount of the recovery;[20] that the receiver has the right to appeal from the judgment of the State court, and that the Federal court should not, as a condition of such appeal, oblige him to execute a *supersedeas* bond;[21] but that judgment in such a suit cannot be enforced by execution against the property;[22] that the time and manner of payment must be determined by the court that appointed a receiver;[22] that the statute does not authorize the interference by the State court with property in the possession of the receiver,[23] by an action of unlawful detainer,[24] a suit to recover

[18] 25 St. at L., p. 436; 24 St. at L., p. 554. See Croy v. Marshall, 21 Ohio W. L. B. 489; Atkin v. Wabash Ry. Co., 41 Fed. R. 193, 194.

[19] Gableman v. Peoria, D. & E. Ry. Co., 179 U. S. 335.

[20] Dillingham v. Hawk (C. C. A.), 60 Fed. R. 494; St. Louis S. W. Ry. Co. v. Holbrook (C. C. A.), 78 Fed. R. 112. But see Mo. Pac. Ry. Co. v. Texas Pac. Ry. Co., 41 Fed. R. 311, 314.

[21] Central Tr. Co. v. St. Louis, A. & T. Ry. Co., 41 Fed. R. 551, 555, 556.

[22] Ibid.; Dillingham v. Hawk (C. C. A.), 60 Fed. R. 494; St. Louis S. W. Ry. Co. v. Holbrook (C. C. A.), 75 Fed. R. 112; Mo. Pac. R. Co. v. Texas Pac. R. Co., 41 Fed. R. 311; Gableman v. Peoria, D. & E. Ry. Co., 179 U. S. 335, 339. A petition to the Federal court for the payment of a claim should show that the receiver holds assets properly applicable thereto. Empire Distilling Co. v. McNulta (C. C. A.), 77 Fed. R. 700. But see Veatch v. Am. L. & Tr. Co. (C. C. A.), 84 Fed. R. 274. The holder of a common-law claim who intervenes in the Federal court in the first instance waives his right to a trial by jury; and if the court submits to a jury the issues that arise thereupon, the verdict is merely advisory. Flippin v. Kimball (C. C. A.), 87 Fed. R. 258. *Cf.* Atkin v. Wabash Ry. Co., 41 Fed. R. 193. For a case where the claimant did not lose any rights by delay till after a dividend had been paid, and the State rule requiring a surrender of collateral was not followed, see London & S. F. Ry. Co. v. Willamette S. M. L. & Md. S. Co., 80 Fed. R. 226.

[23] Comer v. Felton (C. C. A.), 61 Fed. R. 731; Stateler v. Cal. Nat.

[24] Comer v. Felton (C. C. A.), 61 Fed. R. 731.

title or possession to property,[25] or garnishment,[26] or condemnation proceedings,[27] nor prevent an injunction against the interference by the creditors of the assets in the hands of a receiver of a national bank,[28] nor authorize a stockholder of a corporation to enforce a corporate cause of action by a suit against a debtor to the corporation, when the receiver refuses to sue.[29] The proper remedy in all such cases but the last is usually a petition of intervention.[30] It has been further held that the statute applies to receivers appointed before its enactment;[31] that it applies to suits against a receiver for liabilities incurred by his predecessor in office;[32] that it applies to receivers appointed by the courts of the Territories over the property of corporations created by acts of Congress;[33] that non-resident receivers may be served in the same manner as the corporations over which they were appointed;[34] and that an order of a Federal court which discharged a railroad receiver, restored the property to the defendant company and required that all claims against the receiver be presented by intervention to that court before a given date, did not prevent the subsequent recovery in a State court of a judgment against the company for damages

Bank, 77 Fed. R. 43; J. I. C. Plow Works v. Finks (C. C. A.), 81 Fed. R. 524, 529. For a remarkable exertion of Federal power, see Louisville Tr. Co. v. Cincinnati L. P. Ry. Co., 78 Fed. R. 307.

[25] J. I. C. Plow Works v. Finks, 81 Fed. R. 529. So held of a suit to foreclose a lien when the receiver was a defendant. Am. L. & Tr. Co. v. Central Vt. R. Co., 84 Fed. R. 917. *Cf.* Grand Trunk Ry. Co. v. C. Vt. R. Co., 88 Fed. R. 622. So a Federal court refused to entertain a suit to foreclose a lien, Am. L. & Tr. Co. v. Central Vt. R. Co., 84 Fed. R. 917; nor to set aside a fraudulent conveyance of property in the hands of a State receiver. Werner v. Murphy, 60 Fed. R. 769. *Cf. supra*, § 9. For a case where the Federal court appointed a trustee to protect the rights of lienors, see Risk v. Kansas Tr. Co., 58 Fed. R. 45.

[26] Central Tr. Co. v. East Tenn., V. & G. Ry. Co., 59 Fed. R. 523. For the practice by the receiver in such a case, see In re Barnard, 61 Fed. R. 531. For the remedy by a State receiver when property is attached by a United States marshal, see Remington P. Co. v. Louisiana P. & Pub. Co., 56 Fed. R. 287.

[27] Hayes v. Columbus, L. & M. Ry. Co., 67 Fed. R. 630.

[28] Stateler v. Cal. Nat. Bank, 77 Fed. R. 43.

[29] Swope v. Villard, 61 Fed. R. 417. *Cf.* Werner v. Murphy, 60 Fed. R. 769.

[30] Winchester v. Davis Pyrites Co. (C. C. A.), 67 Fed. R. 45; Minot v. Mastin (C. C. A.), 95 Fed. R. 734.

[31] Texas & Pac. Ry. Co. v. Cox, 145 U. S. 593.

[32] McNulta v. Lochridge, 141 U. S. 327; State v. Port Royal & A. Ry. Co., 84 Fed. R. 67. But see Jones v. Schlapbeck, 81 Fed. R. 274.

[33] Wheeler v. Smith, 81 Fed. R. 319.

[34] Eddy v. Lafayette, 163 U. S. 456, 464.

on account of personal injuries caused by the negligent operation of the railroad by the employees of the receiver before his discharge.[35] A Circuit Court of the United States will rarely, if ever, enjoin a proceeding in admiralty in a Federal District Court against property in the hands of one of its receivers.[36] A judgment in a suit thus prosecuted can only be collected out of the property in the hands of the receiver in his official capacity.[37] A receiver appointed under a creditor's bill is not a proper party to an ancillary foreclosure suit.[38] An independent suit to recover a simple contract debt incurred by him cannot be maintained in equity.[39] The creditor must sue at law or bring a petition of intervention in the original suit.[40] A suit begun before the appointment of a receiver may subsequently be prosecuted to judgment, and the judgment so obtained establishes, as against the receiver, the rightful amount of the demand.[41] A party who, pending such a suit, files his claim against the receiver in the suit in which the receiver was appointed, does not thereby make an election of remedies and lose his right to prosecute the suit.[42] In such a case it was held that the claimant thereby lost his right to costs in the original action.[43] It has been held that leave from a State court need not be obtained before suing a receiver appointed by it for the infringement of a patent.[44] A receiver is personally liable to strangers for trespass,[45] fraud,[46] or other

[35] Texas & Pac. Ry. Co. v. Johnson, 151 U. S. 81. Where the receivers remained in possession a few days after the delivery of the deed to the purchaser, a cause of action for negligence then arising is a liability of the receivership enforceable under such a clause of the decree. Fidelity I., Tr. & S. D. Co. v. Norfolk & W. R. Co., 88 Fed. R. 815.

[36] Paxson v. Cunningham, 63 Fed. R. 132. *Cf.* The St. Nicholas, 49 Fed. R. 671.

[37] Farmers' L. & Tr. Co. v. Central R. Co. of Iowa, 2 McCrary, 181; s. c., 7 Fed. R. 537; Barton v. Barbour, 104 U. S. 126; Mo. Pac. Ry. Co. v. Texas Pac. Ry. Co., 41 Fed. R. 310.

[38] Continental Tr. Co. v. Toledo, St. L. & K. C. R. Co., 82 Fed. R. 642.

[39] Nash v. Ingalls, 79 Fed. R. 510.

[40] Ibid.

[41] Pine Lake Iron Co. v. Lafayette Car Works, 53 Fed. R. 853.

[42] Ibid. See Zacher v. Fidelity Tr. & S. D. Co. (C. C. A.), 106 Fed. R. 593.

[43] Ibid.

[44] Hupfeld v. Automatic Piano Co., 66 Fed. R. 788. *Cf.* Curran v. Craig, 22 Fed. R. 101.

[45] In re Young, 7 Fed. R. 855; Olney v. Tanner, 10 Fed. R. 101; Barton v. Barbour, 104 U. S. 126, 134. For a case where a receiver was held not liable for malicious prosecution, see Widmeyer v. Felton, 95 Fed. R. 926.

[46] Bank of Montreal v. Thayer, 7 Fed. R. 622.

willful act, although performed under color of his office. So, if he by mistake, though honestly, takes possession of the property of another, he is personally liable.[47] The fact that he does so under authority of an order of the court will not justify him as against a person who was not a party to the suit or proceeding in which the order was granted.[48] In all of such cases it seems that he can, independently of the statute, be sued without leave of the court which appointed him.[49] A person who, without having been lawfully appointed, assumes to act as a receiver, has all the liabilities of one duly appointed.[50] It has been held that an action will not lie against a receiver for a personal injury sustained before his appointment.[51] The discharge of a receiver until revoked relieves him from all liability to those who had an opportunity to be heard upon the motion for his discharge.[52]

§ 252. Manner of applying for the appointment of a receiver.— It has been held that a court has no jurisdiction to appoint a receiver, unless a cause is pending;[1] and that, therefore, one will never be appointed upon petition[2] when no suit has been begun, except in the case of lunatics.[3] The grounds of the exception and the reasons why it does not extend to infants[4] are not very clear. After a suit has been begun, however, a receiver may be appointed at any stage of it when a necessity is shown,— before appearance,[5] between appearance and answer,[6] between answer and decree,[7] at the decree,[8] or afterwards, if the cause is still open.[9] But a case of pressing

[47] Barton v. Barbour, 104 U. S. 126, 134; Curran v. Craig, 22 Fed. R. 101.

[48] Curran v. Craig, 22 Fed. R. 101.

[49] Barton v. Barbour, 104 U. S. 126, 134; In re Young, 7 Fed. R. 855; Bank of Montreal v. Thayer, 7 Fed. R. 622; Curran v. Craig, 22 Fed. R. 101. But see Aston v. Heron, 2 Myl. & K. 390; Chalie v. Pickering, 1 Keen, 749.

[50] Wood v. Wood, 4 Russ. 558.

[51] Finance Co. of Pa. v. Charleston C. & C. R. Co., 46 Fed. R. 508.

[52] Lehman v. McQuown, 31 Fed. R. 138; Davis v. Duncan, 19 Fed. R. 477.

§ 252. [1] In re Brant, 96 Fed. R. 257; Anon., 1 Atk. 578. See § 260.

[2] In re Brant, 96 Fed. R. 257; Anon., 1 Atk. 578; Ex parte Whitfield, 2 Atk. 315; Merchants' & M. Nat. Bank v. Kent Circuit Judge, 43 Mich. 292.

[3] Ex parte Radcliffe, 1 J. & W. 639; Anon., 1 Atk. 578; Ex parte Warren, 10 Ves. 622.

[4] Ex parte Whitfield, 2 Atk. 315.

[5] Tanfield v. Irvine, 2 Russ. 149.

[6] Vann v. Barnett, 2 Brown Ch. C. 158; Metcalfe v. Pulvertoft, 1 V. & B. 180.

[7] Kershaw v. Mathews, 1 Russ. 361.

[8] Osborne v. Harvey, 1 Y. & C. N. R. 116.

[9] Cooke v. Gwyn, 3 Atk. 689; Atty. Gen. v. Mayor of Galway, 1 Molloy, 95; Bowman v. Bell, 14 Sim. 392.

necessity must exist to justify the appointment of a receiver before answer.[10] An objection to the bill on account of multifariousness or a misjoinder of parties will not prevent the appointment of a receiver; nor will the pendency of a motion for leave to amend the bill,[11] unless indeed the proposed amendment would change materially the allegations showing the necessity for a receiver. The bill should lay the foundation for the appointment by stating the facts which show its necessity and propriety,[12] and should contain a prayer for a receiver.[13] If, however, a state of facts subsequently arise making the appointment necessary, it may probably be made without an amendment of the original or the filing of a supplemental bill.[14] The application for a receiver should be supported by evidence showing that the appointment is necessary.[15] If the application is made before decree, the affidavits should be founded upon the allegations in the bill.[16] If statements not founded on allegations in the bill and alleging facts which existed and were known before the bill was filed, are introduced into the affidavits, it seems that the court will not consider them;[17] and even if, where the case made by the bill fails, sufficient ground for a receiver is confessed in the answer, it seems that a receiver should be denied the plaintiff, at least until he had amended his bill.[18] After an application for a receiver has been once denied, a second application supported by the same papers will rarely be granted.[19] The former rule was that, after answer, a plaintiff when moving for a receiver could

[10] Latham v. Chaffee, 7 Fed. R. 525. See Union Mut. Life Ins. Co. v. Union Mills P. Co., 37 Fed. R. 287.

[11] Barnard v. Darling, 1 Barb. Ch. (N. Y.) 76.

[12] Tomlinson v. Ward, 2 Conn. 396; Verplanck v. Mercantile Ins. Co., 2 Paige (N. Y.), 438. But see Hottenstein v. Conrad, 9 Kan. 435.

[13] Rule 21. But see Osborne v. Harvey, 1 Y. & C. N. R. 116.

[14] Malcolm v. Montgomery, 2 Molloy, 500; Hottenstein v. Conrad, 9 Kan. 435.

[15] Middleton v. Dodswell, 13 Ves. 266; Kerr on Receivers (2d Am. ed.), 154. It was held in a State court that a bill praying for a receiver, sworn to "as being true to the best of affiant's knowledge and belief," is not sufficiently verified. Smith-Dimmick Lumber Co. v. Teague, 24 S. R. 4.

[16] Dawson v. Yates, 1 Beav. 301, 306; Cremen v. Hawkes, 2 Jones & La T. 674; Kerr on Receivers (2d Am. ed.), 154.

[17] Dawson v. Yates, 1 Beav. 301, 306; Kerr on Receivers (2d Am. ed.), 154.

[18] Cremen v. Hawkes, 2 Jones & La T. 674; Kerr on Receivers (2d Am. ed.), 154.

[19] Fenton v. Lumberman's Bank, Clarke Ch. (N. Y.) 360.

only rely upon the admissions in the answer;[20] but now a sworn answer is given upon such a motion little more effect than an ordinary affidavit, and may be contradicted by affidavits in support of the bill.[21] The appointment is usually only made upon notice, and is very rarely granted *ex parte*.[22] Less than one day's notice has been held to be insufficient.[23] A receiver may, however, be appointed *ex parte*, if that is the only way to preserve the property from destruction or serious injury, or removal beyond the jurisdiction of the court.[24] It has been said that a receiver of the assets of a railroad company will rarely be appointed in a suit to which no stockholders or bondholders are actually parties.[25] Where the officer of a corporation who had been served with notice of a motion for the appointment of a receiver fraudulently concealed that fact from his associates, and did not oppose the motion, although no collusion with the plaintiff was shown, a motion to vacate the appointment was entertained.[26] A delay of one month after knowledge of the appointment of a receiver, who had expended in the improvement of the property money furnished him by others, was held such acquiescence as to estop a party from moving to vacate the order of appointment for irregularity because granted without notice to him.[27] Except in an extraordinary case, a receiver will not be appointed over property in the possession of a stranger to the suit.[28]

[20] Daniell's Ch. Pr. (2d Am. ed.) 1976. See Goodman v. Whitcomb, 1 J. & W. 589; Kershaw v. Mathews, 1 Russ. 361.

[21] Allen v. Dallas & W. R. Co., 3 Woods, 816, 832.

[22] Blondheim v. Moore, 11 Md. 365; People v. Norton, 1 Paige (N. Y.), 17; Sandford v. Sinclair, 8 Paige (N. Y.), 373; Miltenberger v. Logansport Ry. Co., 106 U. S. 286.

[23] St. Louis, K. C. & C. Ry. Co. v. Dewees, 23 Fed. R. 691.

[24] Gibson v. Martin, 8 Paige (N. Y.), 481; Johns v. Johns, 23 Ga. 31; Triebert v. Burgess, 11 Md. 452; Gibbons v. Mainwaring, 9 Sim. 77; Miltenberger v. Logansport Ry. Co., 106 U. S. 286; Barley v. Gittings, 15 App. D. C. 421, 437. In Buchanan v. Bay State Gas Co., U. S. C. C. D., Del., Oct. 15, 1896, Judge Wales appointed a receiver *ex parte* upon documentary evidence. In a later case Judge Kirkpatrick in U. S. C. C. D., N. J., appointed a receiver *ex parte*. Brady v. Bay State Gas Co., 106 Fed. R. 584.

[25] Overton v. Memphis & L. R. Co., 10 Fed. R. 866. But see Central T. Co. v. Texas & St. L. Ry. Co., 24 Fed. R. 153.

[26] Allen v. Dallas & W. R. Co., 3 Woods, 816.

[27] Ibid.

[28] Searles v. Jacksonville, P. & M. R. Co., 2 Woods, 621. See also Davis v. Gray, 16 Wall. 203, 218.

§ 253. Who may apply for the appointment of a receiver. A receiver is usually appointed upon the application of the plaintiff. Before a decree it seems that one defendant cannot move for a receiver,[1] unless he has filed a cross-bill praying for one.[2] After a decree, however, he may, in a proper case, obtain a receiver of the property of a co-defendant upon petition,[3] but not usually over the property of the plaintiff without a cross-bill.[4]

§ 254. Manner of the appointment of a receiver.— By the English practice, which was followed in New York before the passage of statutes altering it, when an application for the appointment of a receiver was granted, the selection of the receiver was referred to a master in chancery, whose action was subject to the confirmation of the court.[1] The same master usually exercised supervision over contracts made by the receiver and the adjustment of his compensation.[2] In the Federal courts, however, it is the customary practice for the judge to appoint and often to supervise a receiver himself, without the aid of a master, except when the accounts are passed.[3]

§ 255. Who should be appointed receiver.— As a general rule no one should be appointed receiver of property who has any interest therein,[1] or is in any way connected with the liti-

§ 253. [1] Robinson v. Hadley, 11 Beav. 614; Leddel's Ex'r v. Starr, 19 N. J. Eq. (4 C. E. Green), 159. But see Sargant v. Read, L. R. 1 Ch. D. 600; Henshaw v. Wells, 9 Humph. (Tenn.) 568.

[2] Grote v. Bury, 1 W. R. 92; Robinson v. Hadley, 11 Beav. 614; Kerr on Receivers (2d Am. ed.), 153, 154.

[3] Barlow v. Gains, 8 Beav. 329; Hiles v. Moore, 15 Beav. 175; Kerr on Receivers (2d Am. ed.), 154.

[4] Grote v. Bury, 1 W. R. 92; Robinson v. Hadley, 11 Beav. 614; Kerr on Receivers (2d Am. ed.), 153, 154.

§ 254. [1] Creuze v. Bishop of London, Dick. 687; Thomas v. Dawkin, 1 Ves. Jr. 452; In re Eagle Iron Works, 8 Paige (N. Y.), 385; High on Receivers, § 90; Daniell's Ch. Pr. (2d Am. ed.) 1976.

[2] Thornhill v. Thornhill, 14 Simons, 600.

[3] Miltenberger v. Logansport Ry. Co., 106 U. S. 286; Buck v. Piedmont & A. L. Ins. Co., 4 Fed. R. 849; Frank v. Denver & R. G. Ry. Co., 23 Fed. R. 757. But see Taylor v. Phila. & R. R. Co., 7 Fed. R. 379; s. c., 9 Fed. R. 1; Cowdrey v. Railroad Co., 1 Woods, 331, 341.

§ 255. [1] Wiswell v. Starr, 48 Me. 401. Thus, a stockholder, Wiswell v. Starr, 48 Me. 401; Atkins v. Wabash, St. L. & P. Ry. Co., 29 Fed. R. 161; but see People v. Illinois B. & L. Ass'n, 56 Ill. App. 642; officer or director of a corporation should rarely be appointed a receiver of its assets, Att'y. Gen. v. Bank of Columbia, 1 Paige (N. Y.), 511; Buck v. Piedmont & A. L. Ins. Co., 4 Fed. R. 849; Atkins v.

gation in the course of which the appointment is made,[2] or is nearly related to,[3] or is in the employ of, any of the parties thereto,[4] or who, if he should receive the appointment, would occupy two inconsistent positions;[5] nor a person who is not familiar with the management of similar property,[6] and able

Wabash, St. L. & P. Ry. Co., 29 Fed. R. 161; Baker v. Backus, 32 Ill. 79; Finance Co. of Pa. v. Charleston, C. & S. C. R. Co., 45 Fed. R. 436; Olmstead v. Distilling & C. F. Co., 67 Fed. R. 24: but see Farness L. & Tr. Co. v. No. Pac. R. Co., 61 Fed. R. 546; but see People v. Illinois B. & L. Ass'n, 56 Ill. App. 642; State Tr. Co. v. Nat. Land Imp. & Mfg. Co., 72 Fed. R. 575; or the son or brother of a party to a cause, Williamson v. Wilson, 1 Bland (Md.), 418; Taylor v. Oldham, Jac. 527; but see Shainwald v. Lewis, 8 Fed. R. 878; over property which is the subject of the litigation. Nor should the next friend of an infant, whose duty it is to protect his interest, be appointed receiver over his estate, Stone v. Wishart, 2 Madd. 64; nor an active trustee over the trust estate, Sutton v. Jones, 15 Ves. 584; —— v. Jolland, 8 Ves. 72; although a mere dry trustee may be thus appointed, Sutton v. Jones, 15 Ves. 584; nor should a master in chancery, whose duty it is to pass receivers' accounts, be appointed a receiver, Ex parte Fletcher, 6 Ves. 427. It has also been said in England, "that the receiver-general of taxes for a county cannot be appointed a receiver; for having given, as such, security to the crown, if he were to become indebted to the crown and to the estate, the crown might, by its prerogative process, sweep away all his property." Daniell's Ch. Pr. (2d Am. ed.) 1973. See Atty. Gen. v. Day, 2 Madd. 246, 254. And Lord Eldon held that a peer could not be a receiver, because, "in many instances, a receiver may be committed." Atty. Gen. v. Gee, 2 V. & B. 208. It was held improper to appoint as assignee in bankruptcy of a corporation one who had been appointed by a State court receiver of its assets. In re Stuyvesant Bank, 5 Ben. 566; s. c., 6 N. B. R. 272. But it was subsequently held eminently proper to appoint as receiver of the assets of an insolvent corporation one who by the laws of the State that chartered it was the official custodian of its assets in case of its insolvency, even though that State was in another circuit from the one in which the suit for a receiver was brought, and the officer did not reside within the jurisdiction of the court. In this case it was made a condition of the appointment that the receiver should pay into the registry of the court the proceeds of all assets collected within its jurisdiction, but he was allowed to give sureties who were residents of the State where he dwelt. Taylor v. Life Ass'n of Am., 3 Fed. R. 465.

[2] Baker v. Backus, 32 Ill. 79; Garland v. Garland, 2 Ves. Jr. 137; State Tr. Co. v. Nat. Land & Mfg. Co., 72 Fed. R. 575; Wood v. Oregon Dev. Co., 55 Fed. R. 901.

[3] Williamson v. Wilson, 1 Bland (Md.), 418.

[4] Baker v. Backus, 32 Ill. 79; Atty. Gen. v. Bank of Columbia, 1 Paige (N. Y.), 511; Buck v. Piedmont & A. L. Ins. Co., 4 Fed. R. 849.

[5] Stone v. Wishart, 2 Madd. 64; Ex parte Fletcher, 6 Ves. 427.

[6] Lupton v. Stephenson, 11 Ir. Eq. 484. But it was held that a person was not disqualified from appointment as receiver of a railroad because

to give sufficient attention to the management of his trust.[7] The court may, however, under special circumstances appoint as receiver a trustee,[8] a person interested in the subject of the suit,[9] or even a party to the suit,[10] or his near relation.[11] This, however, should rarely be done unless by consent, or possibly when it clearly appears to be for the interest of all concerned;[12] and in such a case by the English practice the receiver was usually obliged to act without compensation if he accepted the trust.[13] When a party to the cause is appointed receiver in it, he does not thereby lose his privilege of acting as party.[14] It has been held in Tennessee, that no one, not even a clerk of the court, can be made a receiver against his will.[15]

Recent statutes provide that no clerk or deputy clerk of a Federal court shall be appointed receiver except for special reasons which must be assigned in the order of appointment;[16] and that "no person related to any justice or judge of any court of the United States by affinity or consanguinity, within the degree of first cousin, shall hereafter be appointed by such court or judge to or employed by such court or judge in any office or duty in any court of which such justice or judge may

he was not a citizen of the State where the railroad was chartered and situated; nor because he was not a railroad expert and was unacquainted with the mechanical details of the railroad. Farmers' L. & Tr. Co. v. Cape Fear & Y. Val. R. Co., 62 Fed. R. 675. *Contra*, Wynne v. Lord Newborough, 15 Ves. 283. Non-residents are often appointed ancillary receivers. Bayne v. Brewer Pottery Co., 82 Fed. R. 391.

[7] Wynne v. Lord Newborough, 15 Ves. 283; Gibbs v. David, L. R. 20 Eq. 373.

[8] Sykes v. Hastings, 11 Ves. 363; Sutton v. Jones, 15 Ves. 584; Gardner v. Blane, 1 Hare, 381; Powys v. Blagrave, 18 Jur. 463; Ames v. Birkenhead Docks, 20 Beav. 332; Potts v. Warwick & B. C. N. Co., Kay, 143; Kerr on Receivers (2d Am. ed.), 136–139.

[9] Hoffman v. Duncan, 18 Jur. 69; Powys v. Blagrave, 18 Jur. 462; Kerr on Receivers (2d Am. ed.), 136.

[10] Wilson v. Greenwood, 1 Swanst. 471; Blakeney v. Dufaur, 15 Beav. 40; Robinson v. Taylor, 42 Fed. R. 803, 812.

[11] Shainwald v. Lewis, 8 Fed. R. 878.

[12] Atkins v. Wabash, St. L. & P. Ry. Co., 29 Fed. R. 161; Kerr on Receivers (2d Am. ed.), 136–139.

[13] Wilson v. Greenwood, 1 Swanst. 471, 483; Blakeney v. Dufaur, 15 Beav. 40; Hoffman v. Duncan, 18 Jur. 69; Powys v. Blagrave, 18 Jur. 463. But see Newport v. Bury, 23 Beav. 30.

[14] Scott v. Platel, 2 Phil. 229; Cowdrey v. Railroad Co., 1 Woods, 331, 350.

[15] Waters v. Carroll, 9 Yerg. (Tenn.) 102.

[16] 20 St. at L. 415.

be a member."[17] An order may provide for the appointment of a receiver in the alternative to other relief.[18]

§ 256. The receiver's security.— As a general rule, the order for the appointment of a receiver provides that he shall give good and sufficient security for the faithful performance of his duties.[1] This, by the English practice, was usually a recognizance entered into by the receiver and two or more sureties, whereby they, the cognizors, acknowledged "themselves to be indebted to the cognizees (usually the Master of the Rolls and the senior Master of the Court) in certain sums of money to be paid on certain days therein mentioned; in default of which they will and agree that the said sums shall be levied and recovered of them, their heirs, executors, and administrators, and of all and singular their lands and hereditaments, goods and chattels."[2] The recognizance, however, was subject to a condition making it void if the receiver should duly account for the rents and profits of the estate over which he was appointed.[3] In the Federal courts no fixed rule prevails, the security required from a receiver being whatever the judge who orders his appointment thinks proper.[4] When a receiver is appointed by consent, the court may appoint him without requiring security, or upon his own recognizance only.[5] The sureties, when individuals, should usually be residents of the district; but under peculiar circumstances sureties residing elsewhere have been accepted.[6] The sureties of a receiver cannot be discharged at their own request,[7] except under special circumstances, "as where underhand practice is proved, and the person secured shown to be connected with such practice."[8] "For if people voluntarily make themselves bail or sureties for another, they know the terms, and will be held

[17] 25 St. at L. 554.

[18] Curling v. Townshend, 19 Ves. 628.

§ 256. [1] Daniell's Ch. Pr. (2d Am. ed.) 1977; Mead v. Lord Orrery, 3 Atk. 235; Tomlinson v. Ward, 2 Conn. 396.

[2] Daniell's Ch. Pr. (2d Am. ed.) 1977; Mead v. Lord Orrery, 3 Atk. 235; Tomlinson v. Ward, 2 Conn. 396.

[3] Daniell's Ch. Pr. (2d Am. ed.) 1999.

[4] Taylor v. Life Ass'n of Am., 3 Fed. R. 465.

[5] Hibbert v. Hibbert, 3 Meriv. 681; Countess of Carlisle v. Lord Berkley, Amb. 599; Ridout v. Earl of Plymouth, 1 Dickens, 68.

[6] Taylor v. Life Ass'n of Am., 3 Fed. R. 465.

[7] Griffith v. Griffith, 2 Ves. Sen. 400; Gordon v. Calvert, 2 Sim. 253.

[8] Hamilton v. Brewster, 2 Molloy, 407.

very hard to their recognizance, and not discharged at their request to have new sureties appointed, for then there would be no end of it."[9] If a surety should procure his discharge during the continuance of the receivership, the receiver must enter into a fresh recognizance.[10] In law, a surety is liable to the full amount of the penalty of the recognizance, bond, or undertaking by which he is bound.[11] In equity, however, he is only liable to the full amount, including interest as well as principal, which the receiver is liable in equity to pay,[12] unless that exceeds the amount of the penalty, which fixes the extreme limit of his liability.[13] It has been held in England that a surety who has undertaken to be responsible for whatever a receiver "should receive or become liable to pay" as such receiver, is liable for funds received by the receiver before the security was given.[14] Where the parties interested have been guilty of gross delay in compelling the receiver to pass his accounts, the court may excuse the surety from the payment of the whole or part of the interest.[15] According to Daniell, "When an action is brought against a receiver's surety upon the recognizance, the proper course for him to pursue appears to be to apply to the court by motion to stay the proceedings on the recognizance, offering at the same time to pay the amount due from the receiver, so as the same does not exceed the amount of the recognizance, into court; and upon such motion, the order will be made, upon the surety's paying the cost of the application, and of the proceedings consequent upon it. When the receiver's account has not been taken, the motion should also pray a reference to the master to see what is due from the receiver; and it seems that upon such application the court will indulge the surety by allowing him to pay the balance by instalments."[16] When a surety has been obliged to pay anything on account of the receiver, he will be entitled to a lien for his reimbursement upon anything which may subsequently be due to the receiver from the suit.[17] The sureties may be liable for

[9] Lord Hardwicke in Griffith v. Griffith, 2 Ves. Sen. 400.

[10] Vaughan v. Vaughan, 1 Dick. 90; Blois v. Betts, 1 Dick. 336.

[11] Dawson v. Raynes, 2 Russ. 466, 468.

[12] Dawson v. Raynes, 2 Russ. 466.

[13] Walker v. Wild, 1 Madd. 528.

[14] Smart v. Flood, 49 L. T. 467.

[15] Dawson v. Raynes, 2 Russ. 466.

[16] Daniell's Ch. Pr. (2d Am. ed.) 2005, 2006, citing Walker v. Wild, 1 Madd. 528.

[17] Glossop v. Harrison, Cooper, 61; s. c., 3 V. & B. 134.

the malfeasance of the receiver, although the bill under which the appointment was made has been dismissed for want of jurisdiction.[18] In the absence of a rule of court, or of a stipulation in the bond, the liability of the surety should be enforced in an independent action.[19]

§ 257. Receiver's accounts.— A receiver should account annually to the court unless accounts at shorter intervals are required of him.[1] His accounts are filed and passed in the office of the master to whom matters pertaining to the receivership are referred.[2] A receiver's account should describe the situation of the estate at the time when he received it, and any changes that have since taken place. He should then state his receipts and disbursements, which should be set forth in schedules as specifically as possible.[3] He should also state such indebtedness as he has incurred; and, in general, give as full a description of the estate in his hands, and of his actions concerning the same, as is practicable.[4] If a person has not been paid for services rendered to the estate, but has agreed with the receiver to be content with what the court allows him, that fact should be stated in the account together with a description of the services thus performed.[5] Allowances for counsel fees will usually be small, until the final accounting of the receiver, when the full amount earned will be ordered paid.[6] Such allowances are the property of the receiver, not

[18] Baltimore B. & L. Ass'n v. Alderson (C. C. A.), 99 Fed. R. 489.

[19] Kirker v. Owings (C. C. A.), 98 Fed. R. 499.

§ 257. [1] Potts v. Leighton, 15 Ves. 273; General Order, 15 Ves. 278; Lowe v. Lowe, 1 Tenn. Ch. 515.

[2] Daniell's Ch. Pr. (2d Am. ed.) 1996, 1997.

[3] Daniell's Ch. Pr. (2d Am. ed.) 1996, 1997. But see Lafayette Co. v. Neely, 21 Fed. R. 738. He has a lien upon the estate for the repayment of his individual funds advanced to execute orders of the court. Union Tr. Co. v. Illinois Midland Ry. Co., 117 U. S. 434. For a case where the receiver's expenses on a journey to Europe were allowed: N. Ala. Ry. Co. v. Hopkins (C. C. A.), 87 Fed. R. 805.

[4] Daniell's Ch. Pr. (2d Am. ed.) 1996, 1997; Hooper v. Winston, 24 Ill. 353; Hinckley v. Railroad Co., 100 U. S. 153; Atty. Gen. v. N. A. L. I. Co., 89 N. Y. 94, 107; Bourne v. Maybin, 3 Woods, 724, 741; Equity Rule 79.

[5] Adams v. Woods, 8 Cal. 306.

[6] Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 23 Fed. R. 675; Bound v. S. Carolina Ry. Co., 43 Fed. R. 404; Maxwell v. Wilmington Mfg. Co., 83 Fed. R. 214; Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 23 Fed. R. 675; Boston S. D. & Tr. Co. v. Chamberlain (C. C. A.), 66 Fed. R. 847. *Cf.* Sowles v. Nat. Union Bank, 83 Fed. R. 139; Am. Loan & Tr. Co. v. S. Atl.

of his counsel.[7] Where before his appointment a receiver had received rent paid to him in his individual capacity in advance, he was obliged to apportion the rent, and to account for so much of it as was paid for the time during which he acted as receiver of the property, for the use of which the rent was paid.[8] Exceptions should not be taken after a master's report upon a receiver's accounting has been filed, the master acting in the place of the court in a judicial and not in a ministerial capacity.[9] Should the receiver or any other party to the accounting feel aggrieved at a ruling of the master, he should take an exception at the time,[10] and subsequently petition the court to refer the matter back to the master for correction.[11] The court's duty upon such a petition consists in reviewing the principles and rules adopted and followed by the master in allowing the receiver's accounts, rather than in examining the items of the account in detail, or the evidence upon which those items are severally founded; the latter duty belonging more especially to the province of the master acting in his judicial capacity, analogous to the province and duty of a jury on questions of fact.[12] Where the receiver claimed in his accounts a balance as due him, and it was found that he was indebted to the estate, he was charged personally with the costs of the accounting.[13] In a proper case, the receiver, as well as any other party interested, may appeal to the Supreme Court from the final decree entered after his accounting.[14]

§ 258. Compensation of receivers.— The compensation of a receiver is usually fixed in the first instance by the master,[1] with whose determination the court will not ordinarily inter-

& O. R. Co., 81 Fed. R. 62: Kernochan v. Ballance, 56 N. Y. Supp. 132; s. c., 26 N. Y. Misc. 435. It has been held in New York that a receiver's partner may be paid for legal services rendered to him when it is proved that the receiver is not to share in the compensation. In re Simpson, 86 App. Div. 562.

[7] Stuart v. Boulware, 133 U. S. 78.

[8] In re Allin, 8 Fed. R. 753.

[9] Cowdrey v. Railroad Co., 1 Woods, 331, 334.

[10] Ibid.

[11] Ibid.

[12] Ibid.

[13] Gunn v. Ewan, 93 Fed. R. 80.

[14] Cake v. Mohun, 164 U. S. 311; Petersburg S. & I. Co. v. Dellatorre (C. C. A.), 70 Fed. R. 643.

[15] Hinckley v. Gilman C. & S. R. Co., 94 U. S. 467; Hinckley v. Railroad Co., 100 U. S. 153; Hovey v. McDonald, 109 U. S. 150.

§ 258. [1] Cowdrey v. Railroad Co., 1 Woods, 331, 341; Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 32 Fed. R. 187.

fere.[2] The compensation will rarely, if ever, be increased upon appeal.[3] Where the court has fixed a receiver's compensation in advance, it has the power to award him an additional sum for extraordinary labors.[4] In cases of moderate amount, a commission of five per cent upon the receipts and disbursements is not unusual.[5] Where the amounts received and disbursed are large, it is customary to pay the receiver a salary or a lump sum graduated according to the amount of his time employed, the value of the property, the difficulty of his task, and the success of his administration.[6] It has been said that the peculiar duties and responsibilities and accountability of a receiver of a railroad entitle him to a larger amount than would be demanded by the head officer of a railroad, of the same size and business.[7] The receiver's right to compensation

[2] Cowdrey v. Railroad Co., 1 Woods, 331, 341; Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 32 Fed. R. 187.

[3] Hinckley v. Railroad Co., 100 U. S. 153; Stuart v. Boulware, 133 U. S. 78.

[4] Farmers' L. & Tr. Co. v. Central R. R. of Iowa, 8 Fed. R. 60.

[5] Cowdrey v. Railroad Co., 1 Woods, 331, 346; Day v. Croft, 2 Beav. 488. Ten per cent. upon the receipts and five per cent. upon the disbursements was allowed in Cake v. Mohun, 164 U. S. 311.

[6] Cowdrey v. Railroad Co., 1 Woods, 331, 346; Farmers' L. & Tr. Co. v. Central R. R. of Iowa, 8 Fed. R. 60; Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 32 Fed. R. 187.

[7] Bradley, J., in Cowdrey v. Railroad Co., 1 Woods, 331, 347. Approved by Brewer, J., in Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 32 Fed. R. 187, 188. See also Williams v. Morgan, 111 U. S. 684. Receivers of railroads have been frequently allowed as much as $10,000 a year. Hinckley v. Railroad Co., 100 U. S. 153; Cowdrey v. Railroad Co., 1 Woods, 331, 347. But see Farmers' L. & Tr. Co. v. Central R. R. of Iowa, 8 Fed. R. 60. In one reported case two receivers were each allowed $70,000 for three and a half years' work. Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 32 Fed. R. 187. In a few cases not reported larger fees have been allowed. In other cases annual salaries of $6,000, Boston S. D. & Tr. Co. v. Am. R. Tel. Co., 67 Fed. R. 165, 168; Boston S. D. & Tr. Co. v. Chamberlain (C. C. A.), 66 Fed. R. 847, where, for winding up the estate after the railroad was sold, only $1,750 was allowed for seven months; $4,500, Easton v. H. & T. C. Ry. Co., 40 Fed. R. 189; and $2,500, Central Tr. Co. v. Cincinnati, J. & N. Ry. Co., 58 Fed. R. 500, 512. In street-railroad cases much less is allowed. Montgomery v. Petersburg S. & I. Co. (C. C. A.), 70 Fed. R. 746. For a case where the Federal court refused to allow its receiver to set off the amount of compensation awarded him by a State court, for compensation for services as a receiver of the same property in another suit, against the sum he was directed to pay by a decree of the Federal court, see Hinckley v. Railroad Co., 100 U. S. 153; In re Hinckley, 3 Fed. R. 556. For a case of es-

passes to his personal representatives upon his death,[8] and has precedence of the claims of holders of receiver's certificates.[9]

§ 259. Removal of receivers.— A receiver may be removed for misconduct in office,[1] or because his original appointment was obtained by collusion or fraud,[2] or was improper on account of his interest in the subject of the receivership or connection with the parties in interest.[3] A receiver will not be removed or discharged at his own request except for good cause shown, nor ordinarily for a reason which he knew or had ground to anticipate when he accepted the receivership.[4] Ordinarily, a receiver can only be removed by the court which appointed him,[5] upon an application made in the suit in which

toppel against objecting to the amount of compensation, see Dillingham v. Moran (C. C. A.), 81 Fed. R. 759.

[8] Cake v. Mohun, 164 U. S. 311.

[9] Petersburg S. & I. Co. v. Deletorre (C. C. A.), 70 Fed. R. 643.

§ 259. [1] Handy v. Cleveland & Marietta R. Co., 31 Fed. R. 689; Atkins v. Wabash, St. L. & P. Ry. Co., 29 Fed. R. 161; Clarke v. Central R. R. & B. Co., 66 Fed. R. 16. Instances of such misconduct as will be a cause for the removal of a receiver are: unlawful discrimination in charges between different shippers upon a ralroad; Handy v. Cleveland & M. R. Co., 31 Fed. R. 689; Atkins v. Wabash, St. L. & P. Ry. Co., 29 Fed. R. 161; but see Central Tr. Co. v. Ohio Cent. R. Co., 23 Fed. 306; the purchase of supplies for the purpose of the receivership from a firm or corporation in which he is largely interested, Atkins v. Wabash, St. L. & P. Ry. Co., 29 Fed. R. 161; and in the case of two receivers, where they are unable to act in harmony, and the interests of the estate suffer from their discord. Meier v. Kansas Pac. R. Co., 5 Dill. 476. But see Conner v. Belden, 8 Daly (N. Y. C. P.), 257. In the Eastern District of Georgia, the court refused to remove a receiver, who had continued in good faith reports of the condition of the property similar to those issued by the corporation before his appointment, who had aided in a scheme for reorganizing the property, who had in good faith allowed a special rate to a shipper, and whose agents had been guilty of fraud. Clarke v. Central R. R. & B. Co., 66 Fed. R. 16. But in the Second Circuit a receiver very properly is not allowed to become a member of a reorganization committee.

[2] O'Mahoney v. Belmont, 62 N. Y. 133; s. c., 37 N. Y. Super. Ct. 223.

[3] Atkins v. Wabash, St. L. & P. Ry. Co., 29 Fed. R. 161.

[4] Richardson v. Ward, 6 Madd. 266; In re Lytle, 3 Paige Ch. (N. Y.) 251; Smith v. Vaughan, Ridg. *temp.* Hardw. 251; Beach on Receivers, § 782. Thus the court refused to remove, at his own request, a receiver upon the sole ground that the duties of his office interfere with his private business. Beers v. Chelsea Bank, 4 Edw. Ch. (N. Y.) 277. But see Purdy v. Rapalye (N. Y. Ch. 1835); Edwards on Receivers, 661. A receiver may be removed at his own request when by reason of blindness he has become physically incapable of performing the duties of his receivership. Richardson v. Ward, 6 Madd. 266.

[5] Young v. Montgomery & E. R. Co., 2 Woods, 606, 618; Alabama &

his appointment was made.[6] A Federal court may, however, after the removal of a suit, remove a receiver therein appointed by a State court.[7] And it has been held that when a Circuit Court of the United States has appointed a receiver of a line of railroads running through another circuit, as well as through that wherein the appointment is made, his authority in the other circuit is recognized merely by judicial comity, and he may be removed from all control over property therein by the Federal court there held, upon a bill there filed.[8] When a receiver is removed, the court may appoint another in his place. A delay of ten months after knowledge of the facts upon which the motion is founded, in moving for the discharge of a receivership and the removal of a receiver, has been held a sufficient reason for denying the application.[9] Upon an application for the removal of a receiver of a mine, the court ordered that the agent of the applicant be permitted to inspect the mine.[10] The successor to a receiver can usually enforce, at least in equity, contracts made with his predecessor in his official capacity,[11] and is usually responsible in his official capacity for liabilities incurred by his predecessor in the same manner as if he were a corporation sole.[12] Whether a receiver who is not a party to a suit can appeal from an order for his removal is doubtful.[13]

§ 260. Discharge of a receiver.— The discharge of a receiver is a termination of the receivership, and no successor to him is then appointed.[1] It will be ordered when the court is satisfied either that no occasion for a receivership existed when

C. R. Co. v. Jones, 7 N. B. R. 145, 169; Beach on Receivers, §§ 777, 778.

[6] Davis v. Michelbacher (S. C. Wis.), 31 N. W. R. 168; Beach on Receivers, §§ 777, 778.

[7] Texas & St. L. Ry. Co. v. Rust, 17 Fed. R. 275. See *infra*, §§ 260, 391.

[8] Atkins v. Wabash, St. L. & P. Ry. Co., 29 Fed. R. 161; Farmers' L. & Tr. Co. v. No. Pac. R. Co., 69 Fed. R. 871. But see Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 29 Fed. R. 618; Muller v. Dows, 94 U. S. 444; Young v. Montgomery & E. R. Co., 2 Woods, 606, 618; Alabama & C. R. Co. v. Jones, 7 Nat. B. Reg. 145, 160; *supra*, § 242.

[9] Brown v. Lake Superior Iron Co., 134 U. S. 530.

[10] Henszey v. Langdon-Henszey Coal Min. Co., 80 Fed. R. 178.

[11] Thompson v. Phenix Ins. Co., 136 U. S. 287.

[12] McNulta v. Lochridge, 141 U. S. 327.

[13] See Conner v. Belden, 8 Daly (N. Y. C. P.), 257; Wilson v. Barney, 5 Hun (N. Y.), 257; Connolly v. Kretz, 78 N. Y. 620.

§ 260. [1] Beach on Receivers, § 791.

the appointment was made,[2] or that in the course of subsequent events the necessity for the receivership has ceased.[3] Ordinarily, a receiver can be discharged only by the court that appointed him.[4] After the removal of a case from a State to a Federal court, the Federal court may discharge a receiver therein appointed.[5] Any person injured by the appointment of a receiver can move for his discharge although not a party to the suit in which he was appointed.[6] The motion should be made on notice to all parties interested.[7] A motion for the discharge of a receiver may be denied on account of the laches of the moving party.[8] A receiver of the estate of an infant will not be discharged until a year after the infant's majority, unless the ward after majority consents to his discharge.[9] The receiver will not be discharged, as of course, at the motion of the party who procured his appointment, if other parties who have acquired an interest in the receivership object.[10] The entry of a final decree which does not provide for the continuance of a receivership supersedes the appointment of a receiver.[11] Where a receivership had been extended so as to cover the property of a corporation not a party to the bill, an order directing the receiver to return its property to such corporation was held to be equivalent to a revocation of the receivership

[2] Lavender v. Lavender, Irish R. 9 Eq. 593; Furlong v. Edwards, 3 Md. 99; Sage v. Memphis & L. R. Co., 18 Fed. R. 571; s. c., 125 U. S. 361.

[3] Davis v. Duke of Marlborough, 2 Swanst. 108, 168; Bainbrigge v. Blair, 3 Beav. 421.

[4] Young v. Montgomery & E. R. Co., 2 Woods, 606; Beach on Receivers, § 791.

[5] Texas & St. L. Ry. Co. v. Rust, 17 Fed. R. 275; Mahoney Mining Co. v. Bennett, 4 Shaw, 287. As to the disposition of the money in the hands of a receiver thus discharged, see Mack v. Jones, 31 Fed. R. 189, 196.

[6] Thomas v. Brigstocke, 4 Russ. 64; Grenfell v. Dean of Windsor, 2 Beav. 544; Milwaukee & M. R. Co. v. Soutter, 2 Wall. 510.

[7] Davis v. Duke of Marlborough, 2 Swanst. 108, 168; Bainbrigge v. Blair, 3 Beav. 421, 428.

[8] Allen v. Dallas & W. R. Co., 3 Woods, 316, 331; National M. B. Ass'n v. Mariposa Co., 60 Barb. (N. Y.) 423; Hazard v. Credit Mobilier of America, 38 Fed. R. 195; Brown v. Lake Superior Iron Co., 134 U. S. 530.

[9] Matter of Van Horne, 7 Paige Ch. (N. Y.) 346; Wildridge v. McKane, 2 Molloy, 545. See also Bainbrigge v. Blair, 3 Beav. 421.

[10] Bainbrigge v. Blair, 3 Beav. 421; People v. Globe M. L. Ins. Co., 57 How. Pr. (N. Y.) 481; Fay v. Erie & K. R. R. Bank, Harring. (Mich.) 194. See, however, Davis v. Duke of Marlborough, 2 Swanst. 108, 168; Whiteside v. Prendergast, 2 Barb. Ch. (N. Y.) 471.

[11] Daniell's Ch. Pr. (2d Am. ed.) 1765.

as to that company.[12] A receiver may be discharged from the control of real estate, and the rents and profits which he has collected be continued in his control until the termination of the litigation.[13] It has been held that the discharge of a receiver by a decree cannot be set aside upon a motion entered after the term at which it was made.[14] The discharge of a receiver terminates his liability for acts done in his official capacity.[15] After a receiver's discharge damages to the estate resulting from his mismanagement cannot be recovered from the sureties upon an injunction bond concurrent with his appointment.[16] Where a decree discharged a receiver upon condition that he should file a release from the person to whom the property was given by the decree, it was held that his omission to file the release did not make him liable to strangers for former injuries by his employees.[17] Upon the discharge of a receiver and the return of the property to the original owner, who did not oppose the receiver's appointment, the owner is liable for all contracts by the receiver entered into by the authority of the court, and also for the damages caused by the negligence or other torts of the receiver's agents which are incidental to the ordinary management of the property.[18] An order discharging a receiver and directing him to deliver the property to a person from whom he had taken it was held not to be an adjudication that the latter was entitled to the same.[19] It was held where a receiver was discharged because his appointment was not justified, that the expenses of his administration, including his compensation, should be charged against the funds in his hands, and that the party who moved for his appointment should not be obliged to pay them.[20]

[12] Hook v. Bosworth, 64 Fed. R. 448.

[13] Jones v. Smith, 40 Fed. R. 814.

[14] Davis v. Duncan, 19 Fed. R. 477.

[15] Davis v. Duncan, 19 Fed. R. 477; White v. Keokuk & D. M. Ry. Co., 52 Iowa, 97.

[16] Lehman v. M'Quown, 31 Fed. R. 138.

[17] Davis v. Duncan, 18 Fed. R. 477.

[18] Texas & Pac. Ry. Co. v. Huron, 164 U. S. 636, 640; Texas & Pac. Ry. Co. v. Johnson, 151 U. S. 81, 89.

[19] Marshall v. Otto, 59 Fed. R. 249, 255.

[20] Elk Fork O. & G. Co. v. Jennings, 90 Fed. R. 767; New Birmingham I. & L. Co. v. Blevins (Tex. Civ. App.), 34 S. W. R. 828. But see Industrial & Min. G. Co. v. El. Supply Co., 58 Fed. R. 732, 734; Ogden City v. Bear L. & W. & Imp. Co., 55 Fed. R. 385; Farmers' Nat. Bank v. Backus, 77 N. W. R. 142; Northern Ala. Ry. Co. v. Hopkins, 31 C. C. A. 94; s. c., 87 Fed. R. 505; Gallagher v. Gingrich, 105 Iowa, 287; Cutter v. Pollock, 4 N. D. 205.

CHAPTER XVIII.

THE WRIT OF NE EXEAT REPUBLICA.

§ 261. Definition of the writ of ne exeat republica, and when it will issue.— The writ of *ne exeat republica* is a writ which issues from a Federal court of equity to restrain a defendant to a suit therein from departing from the United States without the leave of the court.[1] In England it was called *ne exeat regno*, and was considered a writ of high prerogative. It was originally applicable to purposes of state only, but afterwards extended to private transactions.[2] In the United States the writ has hitherto been issued only at the request of a private party. The Revised Statutes provide that "writs of *ne exeat* may be granted by any justice of the Supreme Court, in cases where they might be granted by the Supreme Court; and by any circuit justice or circuit judge, in cases where they might be granted by the Circuit Court of which he is a judge. But no writ of *ne exeat* shall be granted unless a suit in equity is commenced, and satisfactory proof is made to the court or judge granting the same that the defendant designs quickly to depart from the United States."[3] It is unsettled whether the writ can now issue from a Federal court held in a State which has abolished imprisonment for debt.[4] It has been held that the writ cannot be granted by a judge of the District Court,[5] except when holding a court of equity.[6] The intention of the defendant to depart from the judicial district is not enough to authorize the issue of the writ.[7] The claim of the party applying for the writ must be one enforceable by a suit in a court of equity;[8] except where a decree for permanent

§ 261. [1] Daniell's Ch. Pr. (2d Am. ed.) 1925.

[2] Jackson v. Petrie, 10 Ves. 164; Daniell's Ch. Pr. (2d Am. ed.) 1925; Beames on Ne Exeat, 1-21.

[3] U. S. R. S., § 717.

[4] *Cf.* U. S. R. S., § 990; Mallory Mfg. Co. v. Fox, 20 Fed. R. 409; and *infra*, § 370. See also 24 Am. Law Rev. 535.

[5] Gernon v. Boecaline, 2 Wash. 130.

[6] Lewis v. Shainwald, 7 Saw. 403, 417, 418.

[7] Loewenstein v. Biernbaum, 8 W. N. C. (Pa.) 163.

[8] Pearne v. Lisle, Amb. 75; Seymour v. Hazard, 1 J. Ch. (N. Y.) 1.

alimony has been entered and no appeal therefrom is pending, in which case the English rule was that the writ might issue to compel obedience to the same.[9] The claim must be for the payment of a certain fixed sum of money.[10] A claim for unliquidated damages is insufficient.[11] Thus, the writ cannot issue under a bill to set aside a bill of sale of a vessel, for a return of the vessel or her value, and for an account of her earnings.[12] The debt must be already due.[13] A debt which is contingent,[14] or certain but future,[15] is insufficient. The motives for the defendant's departure, no matter how innocent they may be,— as, for example, that he is about to sail upon a ship of which he is captain,[16]— will not prevent the issue of the writ.[17]

§ 262. Against whom the writ will issue.— The writ was originally confined to subjects of the King of England.[1] It has been extended, however, so as to apply to foreigners as well as subjects of the country from the courts of which the writ issues;[2] and where the court has jurisdiction, the writ may be issued at the suit of one foreigner against another.[3] It seems that the writ may be issued against a married woman in a suit affecting her separate estate.[4] The writ will not issue against a defendant who is under arrest or held to bail in an action at law.[5] The Constitution provides that Senators and Representatives shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same.[6] And the Revised Statutes, that when-

[9] Pearne v. Lisle, Amb. 75; Read v. Read, 1 Ch. Cas. 115; Ex parte Whitmore, 1 Dick. 148; Shaftoe v. Shaftoe, 7 Ves. 171; Street v. Street, 1 T. & R. 322; Daniell's Ch. Pr. (2d Am. ed.) 1926, 1927.

[10] Graham v. Stucken, 4 Blatchf. 50; Daniell's Ch. Pr. (2d Am. ed.) 1931.

[11] Graham v. Stucken, 4 Blatchf. 50.

[12] Ibid.

[13] Whitehouse v. Partridge, 8 Swanst. 365, 377; Seymour v. Hazard, 1 J. Ch. (N. Y.) 1.

[14] Anon., 1 Atk. 521.

[15] Whitehouse v. Partridge, 8 Swanst. 365, 377; Seymour v. Hazard, 1 J. Ch. (N. Y.) 1.

[16] Dick v. Swinton, 1 V. & B. 371.

[17] Stewart v. Graham, 19 Ves. 313; Daniell's Ch. Pr. (2d Am. ed.) 1934, 1935.

§ 262. [1] Daniell's Ch. Pr. (2d Am. ed.) 1933; Beames on Ne Exeat, 1-20.

[2] Flack v. Holm, 1 J. & W. 405; Daniell's Ch. Pr. (2d Am. ed.) 1933, 1934.

[3] De Carriere v. De Calonne, 4 Ves. 577; Mitchell v. Bunch, 2 Paige (N. Y.), 606.

[4] Moore v. Hudson, Mad. & Geld. 218; Moore v. Meynell, 1 Dick. 80; Daniell's Ch. Pr. (2d Am. ed.) 191.

[5] Raynes v. Wyse, 2 Meriv. 472; Daniell's Ch. Pr. (2d Am. ed.) 1930, 1931.

[6] Const., art. I, § 6.

ever any writ or process is sued out or prosecuted by any person in any court of the United States, or of a State, or by any judge or justice, whereby the person of any public minister of any foreign prince or state, authorized and received as such by the President, or any domestic or domestic servant of any such minister, is arrested or imprisoned, or his goods or chattels are distrained, seized, or attached, such writ or process shall be deemed void.[7] Whenever any writ or process is sued out in violation of this statute, every person by whom the same is obtained or prosecuted, whether as party or as attorney or solicitor, and every officer concerned in executing it, is deemed a violator of the laws of nations and a disturber of the public repose, and is liable to imprisonment for not more than three years, and a fine at the discretion of the court.[8] These regulations do not apply to any case where the person against whom the process is issued is a citizen or inhabitant of the United States in the service of a public minister, and the process is founded upon a debt contracted before he entered upon such service; nor to any case where the person against whom the process issued is a domestic servant of a public minister, unless the name of the servant has, before the issuing thereof, been registered in the Department of State, and transmitted by the Secretary of State to the marshal of the District of Columbia, who is required, upon the receipt thereof, to post the same in some public place in his office.[9] All persons may have access to the list of names so posted in the marshal's office, and may take copies without a fee.[10]

§ 263. Practice in obtaining the writ of ne exeat.— The application for a writ of *ne exeat republica* may be made *ex parte*, even after the defendant has appeared.[1] The reason for allowing this is, that notice might frustrate the object of the motion by giving the party an opportunity of removing himself out of the jurisdiction.[2] It has been held in England that the writ cannot be obtained until a bill has been filed.[3] The

[7] U. S. R. S., § 4063. See Ex parte Cabrera, 1 Wash. C. C. 232; U. S. v. Benner, 1 Baldw. 234; U. S. v. Lafontaine, 4 Cranch, C. C. 173.

[8] U. S. R. S., § 4064.

[9] U. S. R. S., § 4065.

[10] U. S. R. S., § 4066.

§ 263. [1] Collinson v. ——, 18 Ves. 353; Elliot v. Sinclair, Jacob, 545.

[2] Elliot v. Sinclair, Jacob, 545.

[3] Ex parte Brunker, 3 P. Wms. 312; Mattocks v. Tremain, 3 J. Ch. (N. Y.) 75. But see Loyd v. Cardy, Prec. in Ch. 171.

equity rules provide that the writ shall be asked for in the bill, when it is required "pending the suit."[4] But it has been held that the writ may be granted at or after the decree, although the bill contains no such prayer.[5] And by the English practice, no prayer in the bill was required.[6] The writ must be supported by an affidavit made by the complainant himself, or some person acquainted with the facts.[7] The affidavit must be positive as to the facts, not merely upon information and belief,[8] except in the case of an account, when the plaintiff may swear that, to the best of his belief, the sum named will be due to him on the balance of the account.[9] A writ was discharged when it appeared from the affidavit that the affiant could not have had personal knowledge of the transaction to which he swore positively.[10] The affidavit must be positive as to the intention of the defendant to go abroad, or to his threats or declarations, or those of members of his family or his agents, showing such an intention on his part.[11] An affidavit stating information from a stranger will ordinarily be insufficient.[12] It is prudent to state in the affidavit that the debt will be endangered by the defendant's quitting the country.[13] Deficiencies in the affidavit may be supplied by admissions in the answer.[14] The court may require as a condition for the issue of the writ that the complainant give an undertaking to respond in damages should the writ be afterwards discharged.[15] The writ is directed to the marshal, and is in substantially the following form:—

[4] Rule 21. But see the language of Lord Eldon in Collinson v. ——, 18 Ves. 353.

[5] Lewis v. Shainwald, 7 Saw. 403, 417.

[6] Collinson v. ——, 18 Ves. 353; Lewis v. Shainwald, 7 Saw. 403, 416, 417.

[7] Collinson v. ——, 18 Ves. 353; Mattocks v. Tremain, 3 J. Ch. (N. Y.) 75.

[8] Rico v. Gualtier, 3 Atk. 501; Jackson v. Petrie, 10 Ves. 164; Mattocks v. Tremain, 3 J. Ch. (N. Y.) 75.

[9] Rico v. Gualtier, 3 Atk. 501; Jackson v. Petrie, 10 Ves. 164.

[10] Roddam v. Hetherington, 5 Ves. 91.

[11] Oldham v. Oldham, 7 Ves. 410; Collinson v. ——, 18 Ves. 353; Knight v. Watts, 2 C. P. Cooper *temp.* Cottenham, 257.

[12] Oldham v. Oldham, 7 Ves. 410.

[13] Mattocks v. Tremain, 3 J. Ch. (N. Y.) 75, 76; Baker v. Haily, 2 Dick. 632; Daniell's Ch. Pr. (5th Am. ed.) 1708, and cases cited. But see McGehee v. Polk, 24 Ga. 406, 412.

[14] Roddam v. Hetherington, 5 Ves. 91, 95.

[15] Daniell's Ch. Pr. (5th Am. ed.) 1708.

THE PRESIDENT OF THE UNITED STATES OF AMERICA TO THE MARSHAL OF THE SOUTHERN DISTRICT OF NEW YORK:

GREETING,—Whereas it is represented to us in our Circuit Court of the United States for the Southern District of New York in equity, on the part of JOHN ABER, complainant, against CHARLES DUTTON, defendant (among other things), that he, the said defendant, is greatly indebted to the said complainant and designs quickly to go into parts without the United States (as by oath made on that behalf appears), which tends to the great prejudice and damage of the said complainant. Therefore, in order to prevent this injustice, we do hereby command you, that you do, without delay, cause the said CHARLES DUTTON personally to appear before you, and give sufficient bail or security in the sum of $—— that the said CHARLES DUTTON will not go, or attempt to go, into parts without the United States without leave of our said Court; and in case the said CHARLES DUTTON shall refuse to give such Bail or Security, then you are to commit the said CHARLES DUTTON to our next prison, there to be kept in safe custody, until he shall do it of his own accord; and, when you shall have taken such security, you are forthwith to make and return a certificate thereof to us in our said Circuit Court of the United States for the Southern District of New York distinctly and plainly under your hand, together with this Writ.

WITNESS, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, at the City of New York, in the County and State of New York, the thirteenth day of November, one thousand eight hundred and eighty-nine.[16]

The writ should be endorsed with the amount of the sum demanded written out in words at length.[17] When it is issued against a personal representative by a person claiming a share of the residuary estate, it should be endorsed with the whole amount due from the defendant, not only to the plaintiff, but to all persons interested in the estate.[18] When the writ is endorsed for a larger sum than is due, the court will ordinarily refuse to quash it, but will require the defendant to give security only for so much as is really due.[19] The writ, upon its

[16] Beames on Ne Exeat, 23, 24.
[17] Beames on Ne Exeat, 93.
[18] Pannell v. Tayler, T. & R. 96, 100.
[19] Ibid.

issue, must be delivered to the marshal. It is his duty thereupon to execute it by arresting the defendant named in it, and bringing him before the court.[20] He has no power to break open doors under the writ.[21] The defendant may be released upon giving sufficient security to satisfy the marshal.[22] After executing the writ, the marshal should make a return of what he has done.[23] The defendant may move at any time to discharge the writ, either for irregularity or upon the merits, by disproving the charges in the complainant's affidavits.[24] But it has been said by Lord Eldon, that where the plaintiff has sworn positively to the debt and to the defendant's declarations of his intention to go abroad, the defendant's unsupported affidavit will be insufficient to contradict this.[25] If the writ is discharged, another writ may issue upon a new affidavit.[26] Upon payment into court of enough to satisfy the plaintiff's claim, the writ will always be discharged.[27] The writ may be discharged if the defendant gives sufficient security to satisfy the court.[28] The security usually required is conditioned that the defendant abide by the process and decree of the court;[29] but security that the defendant abide by and perform the process and decree of the court may be required.[30] The discharging order usually enjoins the defendant from bringing an action of false imprisonment;[31] and the prosecution of such an action may be restrained by a subsequent order.[32] If the court considers the writ improperly issued, it may direct a reference to a master to ascertain the damages sustained by the defendant, and direct the payment to him of the amount found due by the sureties upon the plaintiff's undertaking.[33] An amendment of the bill which does not materially alter the case does not discharge the writ.[34]

[20] Daniell's Ch. Pr. (2d Am. ed.) 1943.

[21] Beames on Ne Exeat, 95.

[22] Beames on Ne Exeat, 96; Boehm v. Wood, T. & R. 332, 340; Daniell's Ch. Pr. (2d Am. ed.) 1943.

[23] Daniell's Ch. Pr. (2d Am. ed.) 1945; Impey on Sheriffs (2d ed.), 532.

[24] Gernon v. Boecaline, 2 Wash. 130; Grant v. Grant, 3 Russ. 598, 602.

[25] Amsinck v. Barklay, 8 Ves. 594, 597; Jones v. Alephsin, 16 Ves. 470, 471.

[26] Gernon v. Boecaline, 2 Wash. 130.

[27] Evans v. Evans, 1 Ves. Jr. 96.

[28] Roddam v. Hetherington, 5 Ves. 91, 95; Boon v. Collingwood, 1 Dick. 115; Beames on Ne Exeat, 98, 99.

[29] Griswold v. Hazard, 141 U. S. 260, 281.

[30] For defenses to such a bond, see Ibid.

[31] Darley v. Nicholson, 2 Dr. & War. 86.

[32] Ibid.

[33] Sichel v. Raphael, 4 L. T. (N. S.) 114.

[34] Grant v. Grant, 5 Russ. 189.

CHAPTER XIX.

EVIDENCE AT LAW AND IN EQUITY.

§ 264. Evidence in general.— The Revised Statutes provide that "the mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses, in open court, except as hereinafter provided;"[1] and "the mode of proof in causes of equity and of admiralty and maritime jurisdiction shall be according to rules now or hereafter prescribed by the Supreme Court, except as herein specially provided for."[2] Evidence consists of admissions upon the record, documents, and the testimony of witnesses. No objection can be taken, on an appeal to the Supreme Court, to the admissibility in evidence of any deposition, deed, grant, or other exhibit found in the record, unless the record shows that objection was taken thereto in the court below.[3] The Federal courts take judicial notice of all public statutes, whether State[4] or

§ 264. [1] U. S. R. S., § 861. See Beardsley v. Littell, 14 Blatchf. 102; Ex parte Fisk, 113 U. S. 713.

[2] U. S. R. S., § 862. See Blease v. Garlington, 92 U. S. 1.

[3] S. C. Rule 13.

[4] Owings v. Hull, 9 Pet. 607; Gormley v. Bunyan, 138 U. S. 623, 635; Mills v. Green, 159 U. S. 651; Fourth Nat. Bank v. Francklyn, 120 U. S. 747. Acts which provide for the construction, operation and lease of railroads are public acts of which the courts take judicial notice. Western & A. R. Co. v. Roberson (C. C. A.), 61 Fed. R. 592. The Federal courts will follow a State statute providing that judicial notice shall be taken of every act of the legislature whether public or private. Case v. Kelly, 133 U. S. 21. They may take judicial notice of the State statutes which were in force before the adoption of the Federal Constitution. Loree v. Abner (C. C. A.), 57 Fed. R. 159. They will also take judicial notice of any rule of law established by the decisions of the State courts. Lamar v. Micou, 114 U. S. 218. But, it has been held, not always of a rule of practice. Yarnell v. Felton, 104 Fed. R. 161. They may take notice of a foreign statute regulating navigation. The New York, 175 U. S. 187. And of public statutes of a foreign nation while exercising jurisdiction over territory since acquired by the United States. U. S. v. Perot, 98 U. S. 438; U. S. v. Chaves, 159 U. S. 452; Bouldin v. Phelps, 30 Fed. R. 547. Otherwise they do not take judicial notice of foreign statutes. Liverpool & G. W. Co. v. Phœnix Ins. Co., 129 U. S. 397; Coghlan v. South Carolina R. Co., 142 U. S. 101. The courts take judicial notice of the seals of State

Federal;[5] of treaties of the United States,[6] and of executive regulations authorized by acts of Congress which have the force of statute,[7] and in general of all facts of which judicial notice is taken by other courts.[8]

of foreign nations, but not of their inferior departments, officers and their seals. Schoerken v. Swift & C. & B. Co., 7 Fed. R. 469, 471. Nor of the local laws of the various tribes in the Indian Territory. Wilson v. Owens (C. C. A.), 86 Fed. R. 571. *Cf.* Davison v. Gibson (C. C. A.), 56 Fed. R. 443. Nor, it has been held, of the local rules and regulations of mines even when they are recognized by the mining laws of the United States. Meyer v. Stevens, 78 Fed. R. 787.

[5] Such as an act of Congress authorizing the construction of a bridge. Pennsylvania Ry. Co. v. Baltimore & N. Y. Ry. Co., 37 Fed. R. 129.

[6] Lacroix Fils v. Sarrazin, 15 Fed. R. 489.

[7] Caha v. U. S., 152 U. S. 211, 822; U. S. v. Williams, 6 Mont. 379.

[8] It has been held that judicial notice will be taken of a public proclamation of general pardon and amnesty. Jenkins v. Collard, 145 U. S. 546. Of the acts of the Executive Department in relation to a guano island. Jones v. U. S., 137 U. S. 202. Of proclamations concerning a blockade and of the practice in the Navy Department in regard to captures. The Paqueta Habana, 175 U. S. 677. Of the custom of issuing and dating land patents several years after the payment of the purchase-money and the issue of the certificates of entry. Bigelow v. Chatterton (C. C. A.), 51 Fed. R. 614. Of correspondence between State and Federal officers concerning swamp lands. Kirby v. Lewis, 39 Fed. R. 66. And of an order of the Secretary of the Interior withdrawing from sale or other disposition certain public land. So. Pac. R. Co. v. Groeck, 68 Fed. R. 609. But *not*, it has been held, of the filing of the map of a railroad route in the Interior Department. McKeoin v. No. Pac. R. Co., 45 Fed. R. 464. Nor of the regulations of the light-house board. Smith v. Hakopee (C. C. A.), 97 Fed. R. 974. Nor of the issue of letters-patent for inventions. Bottle Seal Co. v. De La Vergne R. & S. Co., 47 Fed. R. 59. Nor of the facts stated in reports and messages of Governors to State legislatures. Houston & T. C. Ry. Co. v. Texas, 177 U. S. 66, 94. But see Cœur d' Alene C. & M. Co. v. Miners' Union, 51 Fed. R. 260. Nor of a report of a State auditor concerning the amounts of the various kinds of property subject to taxation. First Nat. Bank v. Chapman, 173 U. S. 205. It has been held, however, that a court may take judicial notice of an established custom of State officers to assess property for taxation at less than its actual value. Railroad & Tel. Cos. v. Board of Equalizers, 85 Fed. R. 302; *contra*, New York v. Barker, 179 U. S. 279. The courts will take judicial notice of historical facts such as the existence of civil war in a foreign State. Underhill v. Hernandez, 168 U. S. 250. That the Dominion of Canada is a British possession. Ex parte Lane, 6 Fed. R. 34; Lumley v. Wabash Ry. Co., 71 Fed. R. 21; but see S. C. (C. C. A.), 76 Fed. R. 66, 69. That the lands surrounding Seattle harbor have for years been selected and known as the site of a city. Ex parte Davidson, 57 Fed. R. 883. But not, it has been held, of the fact that during the civil war the courts of a county were closed. Cross v. Sabin, 13 Fed. R. 308. The courts will take judicial notice of the boundaries of the State

§ 265. Admissions.— Admissions upon the record are either actual or constructive. Actual admissions are made either in the pleadings or by agreement. Every statement of a fact

or county where they hold their sessions, of the judicial districts and of the municipal subdivisions within such State, and of the distance from the State capital to any State subdivision when estimated by a public survey. Hoyt v. Russell, 117 U. S. 401. Of the boundaries of all the States. Thorson v. Peterson, 9 Fed. R. 517. Of the boundaries of counties within the district. Ross v. Fort Wayne (C. C. A.), 63 Fed. R. 466, 469; Bluefield W. & Imp. Co. v. Sanders (C. C. A.), 63 Fed. R. 838. That Asheville, N. C., is distant more than one hundred miles from Dubuque, Iowa. Mut. B. L. I. Co. v. Robinson (C. C. A.), 58 Fed. R. 723. Of the States in which a railroad chartered by companies is situated. Farmers' L. & Tr. Co. v. No. Pac. R. Co., 69 Fed. R. 871, 881. That a river is navigable between two important cities. Lands v. A Cargo of 227 Tons of Coal, 4 Fed. R. 478. But not, it seems, that a river is non-navigable at a certain point. U. S. v. Rio Grande D. & I. Co., 174 U. S. 690, 698. It has been held that the Federal courts will take judicial notice in collateral proceedings of their own orders appointing receivers. Pitkin v. Cowen, 91 Fed. R. 559. And of the proceedings in the suit in which such an appointment was made. Louisville Tr. Co. v. Cincinnati (C. C. A.), 76 Fed. R. 296, 318. Even, it has been held upon an application for a *habeas corpus*, of the affirmance of a previous order denying the writ to the same petitioner. In re Durant, 84 Fed. R. 314. But not in general of the pending of other proceedings in the same court. In re Manderson (C. C. A.), 51 Fed. R. 501. Nor of the decisions upon the facts in other cases. Stewart v. Masterson, 181 U. S. 151. And upon an appeal from an allowance of a claim in a foreclosure suit in which the appellant described himself as "the person having trustee of defendant's property," the court of review refused to take judicial notice of the orders of the court below in the same suit directing the sale of the property or of the proceedings thereunder. Fitzgerald v. Evans (C. C. A.), 49 Fed. R. 426. The court may take judicial notice of the history and state of an art or process of manufacture when that is generally known. Brown v. Piper, 91 U. S. 37; Heaton P. B. F. Co. v. Schlochtmeyer, 69 Fed. R. 592; s. c. (C. C. A.), 72 Fed. R. 520. Especially when that is disclosed by the court's own records in another case. Cushman P. B. Mach. Co. v. Gollard (C. C. A.), 95 Fed. R. 664. But see *supra*, § 106. The courts will take judicial notice of the general facts of natural history. For example, that the imported native sheep of all countries produce fleeces the value of which is depreciated by an excess of hair. Lyon v. Marine (C. C. A.), 55 Fed. R. 964. That a "whiskey cocktail" is an intoxicating drink. U. S. v. Ash, 75 Fed. R. 651. That the pasturage upon uninclosed western lands is very slight evidence of possession. Whitney v. U. S., 167 U. S. 529. But not that there is any substantial difference between lead or other soft metal when wrought or drawn. McCloskey v. Du Bois, 8 Fed. R. 710, 712. Nor of statements in encyclopædias, dictionaries and text-books which are not matters of common knowledge. Kaolatype Eng. Co. v. Hoke, 30 Fed. R. 444.

material to the issues made in the pleadings,[1] affidavits,[2] or other documents used in support of the claim of any party to a suit, who is of full age, whether sworn to or not,[3] may be used as evidence against him upon the hearing. The filing of the general replication does not waive the right to rely on admissions in an answer or plea.[4] The statement by a defendant that he believes, or is informed and believes, that a certain fact occurred, is treated as an admission, unless coupled with some clause to prevent its being so considered.[5] For it is a rule in equity that what the defendant believes, the court will believe.[6] This rule, however, does not apply to the statement of a defendant that he believes that a will was executed as charged in the bill.[7] Admissions in an answer made on behalf of an infant cannot be used against him,[8] unless he adopts the answer after he has reached his majority.[9] An admission of one defendant, whether in his answer or otherwise, is not evidence against any of his co-defendants,[10] who is not his partner,[11] or who does not derive his title from him.[12] An admission of facts by a demurrer is of no effect after the demurrer has been

§ 265. [1] No. Pac. R. Co. v. Paine, 119 U. S. 561. But see Smith v. Davison, 41 Fed. R. 172. An admission in an unverified pleading in another suit which was signed only by an attorney cannot be admitted in evidence. Delaware Co. Com'rs v. Diebold S. & L. Co., 133 U. S. 399. Statements in a verified pleading, verified by a party in another suit, are admissible in evidence, Ballooh v. Hooper, 146 U. S. 363; Pope v. Allis, 115 U. S. 363; except in a criminal prosecution or in an action to enforce a penalty or forfeiture. U. S. R. S., § 860; Daly v. Brady, 69 Fed. R. 285. An admission that a town made a contract admits that it had power to make it. Plankington v. Gray (C. C. A.), 63 Fed. R. 415.

[2] Hyman v. Wheeler, 29 Fed. R. 347; Tugman v. National S. S. Co., 30 Fed. R. 802; Nat. S. S. Co. v. Tugman, 143 U. S. 28. *Cf.* Carey v. Williams, 79 Fed. R. 906.

[3] Smith v. Potter, 3 Wis. 432.

[4] Cavender v. Cavender, 8 Fed. R. 641.

[5] Potter v. Potter, 1 Ves. Sen. 274; Hill v. Binney, 6 Ves. 738.

[6] Potter v. Potter, 1 Ves. Sen. 274; Hill v. Binney, 6 Ves. 738.

[7] Potter v. Potter, 1 Ves. Sen. 274; Davies v. Davies, 3 DeG. & Sm. 698.

[8] Leigh v. Ward, 2 Vent. 72; Eccleston v. Petty, Carth. 79; Savage v. Carroll, 1 B. & B. 548, 553; Wrotesley v. Bendish, 3 P. Wms. 235. See Kingsbury v. Buckner, 134 U. S. 650, 680.

[9] Hinde's Ch. Pr. 422.

[10] Leeds v. Marine Ins. Co., 2 Wheat. 380; Clark's Ex'rs v. Van Riemsdyk, 9 Cranch, 153.

[11] Crosse v. Bedingfield, 12 Simons, 35; Clark's Ex'rs v. Van Riemsdyk, 9 Cranch, 153, 156.

[12] Field v. Holland, 6 Cranch, 8; Osborn v. Bank of U. S., 9 Wheat. 738.

withdrawn or overruled.[13] The parties to a suit may, by an agreement signed by themselves or their solicitors or made in open court by their counsel, admit any fact as proven, or allow testimony to be taken in any manner, unless they thus commit an act repugnant to public policy.[14] Where it had been stipulated that certain evidence should be treated as if taken and afterwards a commission was issued, which it was claimed was inconsistent with the stipulation, it was held that the stipulated evidence would only be expunged by a motion before the hearing, and that an objection to it at the hearing should be overruled.[15] No agreement between counsel will ordinarily be enforced unless reduced to writing or made in open court.[16] A stipulation made by a party who is represented by an attorney may be disregarded.[17]

§ 266. Constructive admissions.— Constructive admissions are those which are implied by law from a party's act. A constructive admission is made by the plaintiff when he files no general replication, but sets the cause down for a hearing upon bill and answer only; or when, in his bill, he does not expressly waive an answer under oath. In the former case, he admits for the purposes of the suit that all the allegations in the answer are true;[1] in the latter, that all are true which he cannot contradict by the testimony of two witnesses, or of a single witness with corroborating circumstances.[2] This rule does not apply, however, unless the allegations in the answer are made positively.[3] Thus, a denial according to the defend-

[13] Anheuser-Busch B. Co. Ass'n v. Bond, 66 Fed. R. 658.

[14] Barker v. Dixie, Reports *temp.* Hardwicke, 252; Owen v. Thomas, 3 M. & K. 353, 357; Nixon v. Albion Ins. Co., L. R. 2 Ex. 38; Lyman v. Kansas C. & A. R. Co., 101 Fed. R. 636. For a case where the court refused to relieve a party from a stipulation, see McNeill v. Andes, 40 Fed. R. 45. As to the power of the next friend of an infant to stipulate, see Kingsbury v. Buckner, 134 U. S. 650, 680. As to the power of a receiver to bind the estate by a stipulation, or admission, see Bosworth v. Terminal R. R. Ass'n of St. Louis, 174 U. S. 182; *supra*, § 249.

[15] Dickerson v. Matheson, 50 Fed. R. 78, 75.

[16] Evans v. State Nat. Bank, 19 Fed. R. 676; Lee v. Simpson, 42 Fed. R. 484.

[17] Bonifield v. Thorp (D. C.), 71 Fed. R. 924.

§ 266. [1] U. S. v. Scott, 3 Woods, 334; Kennedy v. Baylor, 1 Wash. (Va.) 162.

[2] Clark's Ex'rs v. Van Riemsdyk, 9 Cranch, 153, 160; Union Bank of G. v. Geary, 5 Pet. 99, 110; Seitz v. Mitchell, 94 U. S. 580, 582; Vigel v. Hopp, 104 U. S. 441.

[3] Carpenter v. Providence Washington Ins. Co., 4 How. 185; Taylor v. Luther, 2 Sumn. 228; Berry v. Sawyer, 19 Fed. R. 286.

ant's recollection and belief is insufficient for this purpose.[4] So is an allegation upon information and belief.[5] By setting down a plea for argument the plaintiff admits the truth of the allegations of fact therein contained.[6] Constructive admissions are also made by a demurrer, a plea, or a default in pleading. A demurrer admits the truth of the allegations in the bill,[7] but not of conclusions of law therein set forth.[8] A plea admits the truth of so much of the bill as it does not deny.[9] A default by the defendant's failing to file a demurrer, plea, or answer to the bill within the time allowed for that purpose entitles the plaintiff to enter an order taking the bill as confessed by him, whereupon the defendant is deemed to admit the truth of the allegations in the bill.[10] Formerly in England no extra-judicial admissions of a defendant could be given in evidence unless they had been charged in the bill; but that rule probably would not now be followed here.[11] Other testimony also, which was of a kind likely to take a party by surprise, was formerly often excluded unless the pleadings called attention to it.[12]

§ 267. **Documentary evidence in general.**— Documentary evidence consists of all those matters not contained in depositions or affidavits, which are submitted to the court in the shape of written documents. The rules regulating its admission are substantially the same in equity as at common law.[1] In equity, however, such documents as merely require proof of their execution or of the handwriting contained in them may be admitted in evidence at the hearing of the cause if accompanied by an affidavit of these facts, provided that an order, which is granted as of course, has been obtained and served upon the opposite side at least two days before.[2] In some cases, the courts have permitted the proof of such documents by word

[4] Taylor v. Luther, 2 Sumn. 228.

[5] Berry v. Sawyer, 19 Fed. R. 286.

[6] Burrell v. Hackley, 35 Fed. R. 833; Burrell v. Pratt, 35 Fed. R. 834; Beals v. Illinois M. & T. R. Co., 133 U. S. 290.

[7] Pac. R. Co. of Mo. v. Mo. Pac. Ry. Co., 111 U. S. 505, 522. See § 106.

[8] Dillon v. Barnard, 21 Wall. 430. See § 106.

[9] Farley v. Kittson, 120 U. S. 303.

[10] Rules 18, 19. See §§ 103–104, ch. vii.

[11] See § 59, and Smith v. Burnham, 2 Sumn. 612; Jenkins v. Eldredge, 3 Story, 181; Story's Eq. Pl., § 265*a*.

[12] See § 69, and Langdell's Eq. Pl., § 60.

§ 267. [1] Lake v. Philips, 1 Ch. R. 110; Stevens v. Cooper, 1 J. Ch. (N. Y.) 425, 429, and cases cited.

[2] Clare v. Wood, 1 Hare, 314.

of mouth under oath at the hearing, when their existence and execution was not denied by the answer.[3] Telegrams do not prove themselves, and are ordinarily inadmissible without evidence that they were sent by the persons whose names are signed to the copies delivered.[4] According to the old English practice, the adverse party had no right, in the absence of special circumstances, to compel before the hearing the production of any exhibit, however it had been proved,—except, perhaps, when the deposition proving it had set it out *verbatim;* nor even to inspect it, it being considered that a party should not before the hearing see the strength of the cause, or any deed, to pick holes in it.[5] The practice in the Federal courts is otherwise. There, both in equity and at common law, either party may upon motion supported by affidavit, which affidavit may be controverted, compel the other party to produce for his inspection on the trial or hearing any books or other documents material to the issues, which are in his opponent's possession or under his opponent's control.[6] It has been held that such an order will not be granted when the production of the papers can be compelled by a subpœna *duces tecum* which has been served.[7] When a party inspects a document which he has compelled his adversary to produce under a subpœna *duces tecum*, and then fails to offer it in evidence, his adversary may put it in evidence.[8] A party may be compelled to produce an application for a patent which has not been issued and correspondence with the Patent Office upon the subject, although he claims that the result will be to disclose confidential communications

[3] Wood v. Mann, 2 Sumn. 316; Nesmith v. Calvert, 1 W. & M. 34; Atty. Gen. v. Pearson, 7 Sim. 290, 303.

[4] Drexel v. True (C. C. A.), 74 Fed. R. 12. See Dunbar v. U. S., 156 U. S. 185; s. c., 60 Fed. R. 75. A subpœna *duces tecum*, directed to the superintendent of a telegraph company, to produce telegrams between a number of parties, was held to be sufficient, although it did not describe the messages by date, or identify the particular ones required. In re Starror, 63 Fed. R. 564.

[5] Davers v. Davers, 2 P. Wms. 410. For the English practice of admitting exhibits upon the hearing, see Wood v. Strickland, 2 Mer. 461.

[6] Coit v. N. C. Gold Am. Co., 9 Fed. R. 577. *Cf.* U. S. R. S., § 724; Kirkpatrick v. Pope Mfg. Co., 61 Fed. R. 46, and *infra*, § 372. But see Guyot v. Hilton, 32 Fed. R. 743; Colgate v. Compagnie Francaise, 23 Fed. R. 82; Ryder v. Bateman, 93 Fed. R. 31.

[7] Edison El. L. Co. v. U. S. El. L. Co., 44 Fed. R. 294, 300.

[8] Edison El. L. Co. v. U. S. El. L. Co., 45 Fed. R. 55. But see Treadwell v. Lennig, 50 Fed. R. 872.

with his attorneys.[9] When a party had filed an exhibit drawn in pencil, a motion requiring him to refile it drawn in ink was denied.[10] A party is not entitled to a general inspection of books and papers in his adversary's possession. In the case of an inspection of books, the usual practice is to have all except the pages containing the material matter sealed up, and to have the inspection take place under the supervision of a master or commissioner.[11] In an action to recover a penalty, whether brought by a private individual or by the United States, and in a proceeding to enforce a forfeiture of property, the defendant or owner of the property seized cannot be compelled to produce his books or papers or other articles of personal property for the inspection of the opposite party, and should such an inspection be compelled, the judgment may be reversed upon that ground alone.[12] It has been held that, under a subpœna *duces tecum*, a witness cannot be compelled to produce patterns of the casting of a stove, or anything except books and papers;[13] that the production of drawings but not of models may be thus compelled;[14] and that inspection of a mine may be allowed in a proceeding to remove a receiver.[15] It has been held that an attorney cannot be compelled by a subpœna *duces tecum* to produce a document upon which he has a lien;[16] that a Federal collector of internal revenue cannot be thus compelled to produce in a State court official papers which a regulation of the Treasury Department forbids him to show to any one;[17] and that an officer or agent of a private corporation that is not

[9] Ibid.; and s. c., 44 Fed. R. 294. But see Rule 15 of Patent Office; U. S. R. S., § 4902.

[10] Tubman v. Wason Mfg. Co., 44 Fed. R. 429.

[11] Robbins v. Denis, 1 Blatchf. 288, 243.

[12] Johnson v. Donaldson, 18 Blatchf. 287; Boyd v. U. S., 116 U. S. 616. See U. S. v. Denicke, 35 Fed. R. 407, 410.

[13] In re Sheppard, 8 Fed. R. 12.

[14] Johnson Steel S. R. Co. v. N. B. S. Co., 48 Fed. R. 191; Diamond Match Co. v. Oshkosh M. Works, 63 Fed. R. 984.

[15] Henszey v. Langdon-Henszey Coal Min. Co., 80 Fed. R. 778. A State statute empowering the courts to compel the inspection and survey of a mine is constitutional. Montana Co. v. St. Louis Min. & Mfg. Co., 152 U. S. 160. *Cf. infra*, § 372.

[16] Davis v. Davis, 90 Fed. R. 791.

[17] Boske v. Comengore, 177 U. S. 459. When a party needs to use in a State court papers on file in the clerk's office of a Federal court, the safer practice is to apply to the Federal court for permission to serve a subpœna *duces tecum* upon its clerk. Harkrader v. Wadley, 172 U. S. 148, 153; s. c. as Wadley v. Blount, 65 Fed. R. 667.

a party to a suit cannot be compelled to bring into court the books of the corporation and to open them for examination there.[18] The English rule was that in a suit against the heir-at-law to establish the validity of a will, all the witnesses to the will who are alive, sane, and within the jurisdiction of the court, must be examined;[19] and the testator's sanity must be proved affirmatively.[20] This rule does not, however, apply to suits to establish the trusts of a will, or to appoint a new trustee, or in any other case when the validity of the will is not directly in issue.[21] It has been said that a party who has fraudulently altered documents which he offers in evidence is thereby debarred from all relief in equity.[22]

§ 268. Federal statutes regulating admission of documentary evidence.— The Revised Statutes of the United States provide as follows concerning the admission of documentary evidence: "Copies of any books, records, papers, or documents in any of the Executive Departments, authenticated under the seals of such Departments, respectively, shall be admitted in evidence equally with the originals thereof."[1] The mode of authentication prescribed by the statute must be strictly followed.[2] The words, "papers or documents," mean only such as are made by an officer and an agent of the government in

[18] Southern Ry. Co. v. North Carolina Corp. Com'rs, 104 Fed. R. 700. *Contra*, Wertheim v. Continental Ry. & Tr. Co., 15 Fed. R. 716; U. S. v. Babcock, Fed. Cas. No. 14,484. *Cf.* Russell v. McLennan, Fed. Cas. No. 12,158; In re Hirsch, 74 Fed. R. 928; McMullen v. Ritchie, 57 Fed. R. 104. As to the right of a stockholder to inspect the books of the corporation, see Ranger v. Champion C. P. Co., 51 Fed. R. 61.

It has been held that entries in the books of a corporation showing a transfer of stock to a person and payment by him of instalments of the subscription thereto are not *prima facie* evidence that he is a stockholder. Carey v. Williams (C. C. A.), 79 Fed. R. 906. But see Turnbull v. Payson, 95 U. S. 418; Liggett v. Glenn (C. C. A.), 51 Fed. R. 881.

[19] Bootle v. Blundell, 19 Ves. 494*b*, 505.

[20] Harris v. Ingledew, 3 P. Wms. 91; Wallis v. Hodgeson, 2 Atk. 56.

[21] Bootle v. Blundell, 19 Ves. 494*b*, 505; Concannon v. Cruise, 2 Molloy, 332.

[22] Harton v. McKee, 73 Fed. R. 556.

§ 268. [1] U. S. R. S., § 882. See Barney v. Schneider, 9 Wall. 248; Chadwick v. U. S., 3 Fed. R. 750; Block v. U. S., 7 Ct. Cl. 406; U. S. v. Liddle, 2 Wash. 205; U. S. v. Benner, 1 Bald. 234; White v. St. Guirons, Minor (Ala.), 331; Catlett v. Pac. Ins. Co., 1 Paine, 594; Bleecker v. Bond, 3 Wash. 529; Thompson v. Smith, 2 Bond, 320; Wetmore v. U. S., 10 Pet. 647; Wickliffe v. Hill, 3 Litt. (Ky.) 330.

[2] Smith v. U. S., 5 Pet. 291, 300; Block v. U. S., 7 Ct. Cl. 406; Bleecker

the discharge of his official duty; and copies of such are not competent evidence unless it was the duty of the officer to file the originals.[3] In cases described in section 886 of the Revised Statutes, proof must be given in accordance with the provisions of that section.[4] The original papers may also be put in evidence.[5] In cases where the government is a party, duly authenticated copies should be procured and the fees therefor paid, and a mere notice to produce the original is not sufficient.[6] Papers which were a part of the archives of the late so-called "Confederate Government" must be proved by proper testimony.[7] The certificate of the Secretary of the

v. Bond, 3 Wash. 531; U. S. v. Harrill, McAll. 243; Wickliffe v. Hill, 3 Litt. (Ky.) 330. If the officer having charge of the paper certifies that the copy is correct, and the head of a department certifies to the officer's character, the paper is sufficiently authenticated, provided that the seal from the department is attached thereto. Ballew v. U. S., 160 U. S. 187. In the case of documents filed in the Treasury Department, an authentication under the seal of that department and the signature of the Secretary and the Assistant Secretary of the Treasury is sufficient. Chadwicke v. U. S., 3 Fed. R. 750. The original canceled register of a lost vessel has been held to come within the statute. Catlett v. Pacific Ins. Co., 1 Paine, 612. See Bleecker v. Bond, 3 Wash. 29. Statements in the manifests of vessels concerning the occupation and nationality of passengers are not evidence of those facts. U. S. v. Wilson, 60 Fed. R. 890, 896. Accounts and papers filed in the office of the Quartermaster-General may thus be proved. Thompson v. Smith, 2 Bond, 320. See Crowell v. Hopkinson, 45 N. H. 9. Entries in a ship's log are strong evidence against the party making them. The Newfoundland, 89 Fed. R. 510. "The design and meaning of this rule is not to convert incompetent and irrelevant evidence into competent and relevant evidence simply because it is contained in an official communication. Had the officer been testifying under oath, such an assertion would have been excluded as inadmissible, upon the ground that the statement itself implied the existence of primary and more original and explicit sources of information. The courts hold this rule which has been invoked to be limited to only such a statement in official documents as the officers are bound to make in the regular course of official duty. The statement of extraneous or independent circumstances, however naturally they may be deemed to have a place in the narrative, is no proof of such circumstances, and is therefore rejected." U. S. v. Corwin, 129 U. S. 381, 386. *Cf.* The Ship Parkman, 35 Ct. Cl. 406.

[3] Block v. U. S., 7 Ct. Cl. 406.

[4] Chadwicke v. U. S., 3 Fed. R. 750; White v. St. Guirons, Minor (Ala.), 331; U. S. v. Humason, 8 Fed. R. 71.

[5] Bruce v. Manchester & K. R. Co., 19 Fed. R. 342.

[6] Barney v. Schneider, 9 Wall. 248; Chadwick v. U. S., 3 Fed. R. 750; U. S. v. Scott, 25 Fed. R. 470; U. S. v. Benner, 1 Bald. 234; U. S. v. Perchman, 7 Pet. 51; Winn v. Patterson, 9 Pet. 663; James v. Gordon, 1 Wash. 333.

[7] Chorbin v. U. S., 6 Ct. Cl. 430.

Spanish Governor of Florida is *prima facie* evidence of the existence of a grant of land.[8] "The volume of public documents, printed by authority of the Senate of the United States, containing letters to and from various officers of state, communicated by the President of the United States to the Senate, is as competent evidence as the original documents themselves."[9] "Copies of any documents, records, books, or papers in the office of the Solicitor of the Treasury, certified by him under the seal of his office, or, when his office is vacant, by the officer acting as Solicitor for the time, shall be evidence equally with the originals."[10] "Every certificate, assignment, and conveyance executed by the Comptroller of the Currency, in pursuance of law, and sealed with his seal of office, shall be received in evidence in all places and courts; and all copies of papers in his office certified by him and authenticated by the said seal, shall in all cases be evidence equally with the originals. An impression of such seal directly on the paper shall be as valid as if made on wax or wafer."[11] "Copies of the organization certificate of any national banking association, duly certified by the Comptroller of the Currency, and authenticated by his seal of office, shall be evidence in all courts and places within the jurisdiction of the United States of the existence of the association, and of every matter which could be proved by the production of the original certificate."[12]

"When suit is brought in any case of delinquency of a revenue officer, or other person accountable for public money, a transcript from the books and proceedings of the Treasury Department certified by the" Secretary and Assistant Secretary "and authenticated under the seal of the Department, or, when the suit involves the accounts of the War or Navy Departments, certified by the" Secretary or an Assistant Secretary of the Treasury, "and authenticated under the seal of the Treasury Department, shall be admitted as evidence, and the court try-

[8] U. S. v. Wiggins, 14 Pet. 334; U. S. v. Acosta, 1 How. 24.

[9] Whiton v. Albany Ins. Co., 109 Mass. 80. *Cf.* Doe v. Roe, 13 Fla. 602.

[10] U. S. R. S., § 883.

[11] U. S. R. S., § 884.

[12] U. S. R. S., § 885; First Nat. Bank v. Kidd, 20 Minn. 234; Washington Co. Nat. Bank v. Lee, 113 Mass. 521; Merchants' Nat. Bank v. Glendon Co., 120 Mass. 97. A certificate is sufficient in the absence of any evidence that there is any other national bank of the same name at the same place. Washington Co. Nat. Bank v. Lee, 113 Mass. 521.

ing the cause shall be authorized to grant judgment and award execution accordingly. And all copies of bonds, contracts, or other papers relating to, or connected with, the settlement of any account between the United States and an individual, when certified by the" Secretary or an Assistant Secretary of the Treasury "to be true copies of the original on file, and authenticated under the seal of the Department, may be annexed to such transcripts, and shall have equal validity, and be entitled to the same degree of credit which would be due to the original papers if produced and authenticated in court: provided, that where suit is brought upon a bond or other sealed instrument, and the defendant pleads '*non est factum*,' or makes his motion to the court, verifying such plea or motion by his oath, the court may take the same into consideration, and, if it appears to be necessary for the attainment of justice, may require the production of the original bond, contract, or other paper specified in such affidavit."[13]

[13] U. S. R. S., § 886, as amended by 28 Stat. 764; Bechtel v. U. S., 101 U. S. 597; U. S. v. Bell, 111 U. S. 477; U. S. v. Stone, 106 U. S. 525; Moses v. U. S., 166 U. S. 571, 598. This section applies to sureties as well as to principals. U. S. v. Gaussen, 19 Wall. 198. It applies only to suits against persons accountable for public moneys as such. U. S. v. Radowitz, 8 Rep. 268. See U. S. v. Griffith, 2 Cranch, C. C. 666. It does not apply to an action on the official bond of a superintendent of the mint for failure to safely keep property intrusted to his care. U. S. v. Bosbyshell (D. C.), 73 Fed. R. 616.

"There are two kinds of transcripts which the statute authorizes the proper officer to certify. First, a transcript from the 'books and proceedings of the treasury;' and second, 'copies of bonds, contracts, and other papers, etc., which remain on file, and relate to the settlement.' Under the first head are included charges of moneys advanced or paid by the department to the agent, and an entry of items suspended, rejected, or placed to his credit. These all appear upon the books of the department. The decision made on the vouchers exhibited, and the statement of the amount, constitute, in part, the proceedings of the treasury. Under the second head, copies of papers which remain on file, and which have a relation to the settlement, may be certified. In this case it is essential that the officer certify that the transcripts 'are true copies of the originals which remain on file.'" Smith v. U. S., 5 Pet. 291, 300, 301, per Mr. Justice M'Lean. "An account stated at the Treasury Department which does not arise in the ordinary mode of doing business in that department can derive no additional validity from being certified under the act of Congress. Such a statement can only be regarded as establishing items for moneys disbursed through the ordinary channels of the department, where the transactions are shown by its books. In these cases, the officers may well certify, for they must have official knowledge of the facts stated. But

"Upon the trial of any indictment against any person for embezzling public moneys, it shall be sufficient evidence, for the purpose of showing a balance against such person, to produce a transcript from the books and proceedings of the Treas-

where moneys come into the hands of an individual, as in the case under consideration, the books of the treasury do not exhibit the facts, nor can they be officially known to the officers of the department. In this case, therefore, the claim must be established not by the treasury statement, but by the evidence on which that statement was made." U. S. v. Buford, 3 Pet. 12, 29, per Mr. Justice M'Lean. A copy of a bond certified by the Secretary of the Treasury without the certificate of the register and auditor is insufficient. U. S. v. Humason, 8 Fed. R. 71. The certificate should show that the transcript exhibits the final adjustment of the debits, as shown not by mere copies of original papers on the files, but upon the books and records of the department. U. S. v. Pinson, 102 U. S. 548; Tiernan v. Jackson, 5 Pet. 592; U. S. v. Buford, 3 Pet. 12; Cox v. U. S., 6 Pet. 172; U. S. v. Jones, 8 Pet. 375; Gratton v. U. S., 15 Pet. 336; Hoyt v. U. S., 10 How. 109; Bruce v. U. S., 17 How. 437. It seems that the balances struck by the treasury and charged as such are not evidence, but that the items should be stated. U. S. v. Edwards, 1 McLean, 347; U. S. v. Jones, 8 Pet. 375; Gratiot v. U. S., 15 Pet. 336; Hoyt v. U. S., 10 How. 109; U. S. v. Martin, 2 Paine, 68; U. S. v. Gaussen, 19 Wall. 198; U. S. v. Smith, 35 Fed. R. 490; U. S. v. Van Zandt, 2 Cranch C. C. 338; U. S. v. Kuhn, 4 Cranch C. C. 401. A transcript from the books may be evidence of charges for moneys advanced or paid by the department to the agent, and claims, suspended, rejected, or placed to his credit; but not of moneys received by him for the benefit of the United States from other sources than the department. U. S. v. Buford, 3 Pet. 12; U. S. v. Jones, 8 Pet. 375. A transcript showing the money expended by the officers in supplying the default of the contractor to carry out his contract is competent evidence. U. S. v. Griffith, 2 Cranch C. C. 666. The government need not show that the party had notice of the adjustment or of the balance against him in the transcript. Watkins v. U. S., 9 Wall. 759. "The statute says that a transcript from the books shall be admitted as evidence. A transcript or a transcribing is substantially a copy. A copy from the books, and not of the books, shall be admissible in evidence. An extract from the books, a portion of the books, when authenticated to be a copy, may be given in evidence. While a garbled statement is not evidence, or a mutilated statement, wherein the debits shall be presented and the credits suppressed, or perhaps a statement of results only, it still seems to be clear that it is not necessary that every account with an individual, and all of every account, shall be transcribed as a condition of the admissibility of any one account. The statement presented should be complete in itself, perfect for what it purports to represent, and give both sides of the account as the same stands upon the books." U. S. v. Gaussen, 19 Wall. 212, 214, per Justice Hunt. Treasury statements are only *prima facie* evidence of the correctness of the balance. The accounting officer may correct mistakes and restate balances. Soule v. U. S., 100 U. S. 8, 11; U. S. v. Ecksford, 1 How. 250, 263;

ury Department, as provided by the preceding section."[14] "A copy of any return of a contract returned and filed in the returns-office of the Department of the Interior, as provided by law, when certified by the clerk of said office to be full and complete, and when authenticated by the seal of the Department, shall be evidence in any prosecution against any officer for falsely and corruptly swearing to the affidavit required by law to be made by such officer in making his return of any contract as required by law, to said returns-office."[15]

"Copies of the quarterly returns of postmasters and of any papers pertaining to the accounts in the office of the sixth auditor, and transcripts from the money-order account-books of the Post-Office Department, when certified by the sixth auditor under the seal of his office, shall be admitted as evidence in the courts of the United States, in civil suits and criminal prosecutions; and in any civil suit, in case of delinquency of any postmaster or contractor, a statement of the account, certified as aforesaid, shall be admitted in evidence, and the court shall be authorized thereupon to give judgment and award execution, subject to the provisions of law as to proceedings in such civil suits."[16]

"In all suits for the recovery of balances due from postmasters, a copy, duly certified under the seal of the sixth auditor, of the statement of any postmaster, special agent, or other person, employed by the Postmaster-General, or the auditor for that purpose, that he has mailed a letter to such delinquent postmaster, at the postoffice where the indebtedness accrued, or at his last usual place of abode; that a sufficient time has elapsed for said letter to have reached its destination in the

U. S. v. Eggleson, 4 Saw. 201; U. S. v. Hunt, 105 U. S. 188, 187. But see U. S. v. Collier, 3 Blatchf. 325; Ex parte Randolph, 2 Brock. 44. The errors made in striking the balance may be proved by the defendant by the procuring of the original vouchers, or otherwise. Soule v. U. S., 100 U. S. 8; Bruce v. U. S., 17 How. 437; U. S. v. Stone, 106 U. S. 525. The defendant by accepting the credits given him does not waive the objection to the items on the debit side. U. S. v. Jones, 8 Pet. 375.

[14] U. S. R. S., § 887. See U. S. v. Gaussen, 19 Wall. 198.

[15] U. S. R. S., § 888. See U. S. R. S., § 3744.

[16] U. S. R. S., § 889; U. S. v. Dumas, 149 U. S. 278; U. S. v. Carlowitz (C. C. A.), 80 Fed. R. 852; Soule v. U. S., 100 U. S. 8, 11; U. S. v. Harrill, McAll. 243; U. S. v. Hodge, 13 How. 478; U. S. v. Hilliard, 3 McLean, 324; U. S. v. Wilkinson, 12 How. 246; Postmaster-General v. Rice, Gilp. 554; Lawrence v. U. S., 2 McLean, 581; U. S. v. Snyder, 14 Fed. R. 554.

ordinary course of the mail, and the payment of such balance has not been received, within the time designated in his instructions, shall be received as sufficient evidence in the courts of the United States or other courts, that a demand has been made upon the delinquent postmaster; but when the account of a late postmaster has been once adjusted and settled, and a demand has been made for the balance appearing to be due, and afterward allowances are made on credits entered, it shall not be necessary to make a further demand for the new balance found to be due."[17]

"Copies of any records, books, or papers in the general land office, authenticated by the seal and certified by the commissioner thereof, or, when his office is vacant, by the principal clerk, shall be evidence equally with the originals thereof. And literal exemplifications of any such records shall be held, when so introduced in evidence, to be of the same validity as if the names of the officers signing and countersigning the same had been fully inserted in such record."[18]

[17] U. S. R. S., § 890.

[18] U. S. R. S., § 891. This section only applies to official documents. Block v. U. S., 7 Ct. Cl. 406. The words, "evidence equally with the originals," do not mean that in all cases the copy shall have the same probative force as the original, and that on a question as to some particular word or figure, the copy shall be as convincing as the original; it merely requires the copy to be regarded as of the same class in the grades of evidence, as to written and parol, and primary and secondary. Campbell v. Laclede Gas Co., 119 U. S. 445, 449. See Galt v. Galloway, 4 Pet. 331. A party is not deprived of his title because of a defective record, if he has a perfect patent. A perfect record of a perfect patent proves the grant; but a perfect record of an imperfect patent, or an imperfect record of a perfect patent, has no such effect. In such a case, if a perfect patent has in fact issued, it must be proved in some other way than by the record. McGarrahan v. Mining Co., 96 U. S. 316, 323; Campbell v. Laclede Gas Co., 119 U. S. 445, 449. The defective record in the general land office does not deprive a party of his rights, and the contents of the original may be shown if the record or transcript is not a true copy. McGarrahan v. Mining Co., 96 U. S. 316, 323; Campbell v. Laclede Gas Co., 119 U. S. 445. "The names need not be fully inserted in the record, but it must appear in some form that the names were actually signed to the patent when it issued." McGarrahan v. Mining Co., 96 U. S. 316, 323. A perfect record of a perfect patent is presumptive evidence of its delivery to and acceptance by the grantee. Ibid. An entry in the books of the land office, that the balance of the purchase-money was paid by the person "to whom the patent had issued," is some evidence that a patent issued, although no patent is produced. Willis v. Bucher, 3 Wash. C. C. 369. A certificate by a receiver

"Written or printed copies of any records, books, papers, or drawings belonging to the patent office, and of letters-patent authenticated by the seal and certified by the commissioner or acting commissioner thereof, shall be evidence in all cases wherein the originals could be evidence; and any person making application therefor, and paying the fee required by law, shall have certified copies thereof."[19]

that a party has made full payment is evidence that such party has taken the steps necessary for a pre-emption. McDonald v. Edmonds, 44 Cal. 328. A copy of a plat and description duly authenticated is admissible. Harris v. Barnett, 4 Blatchf. 369. A connected plat of sundry tracts of land made and put together by an officer of the land office, which is not the copy of any record in such office, is not competent evidence. Griffith v. Truckhomer, Pet. C. C. 166. Under this statute a certified copy of the records of the land office at Washington, concerning the location of a land warrant containing a description of the various acts of the register and receiver at the land office at Chicago, and of the locator in regard to the location, showing that the land was subject to location at the time, and that the land warrant was properly delivered up and deposited with the commissioner of the land office, is admissible in evidence. Culver v. Uthe, 133 U. S. 655.

[19] U. S. R. S., § 892. *Cf.* Edison E. L. Co. v. U. S. E. L. Co., 44 Fed. R. 294. A transcript of certain documents on file is competent, although not a transcript of the whole proceedings. Toohey v. Harding, 1 Fed. R. 174. Proof that there is no record must be made by deposition or attendance in court of the proper officer; and a mere certificate that diligent search has been made is not sufficient. Stoner v. Ellis, 6 Ind. 152; Bullock v. Wallingford, 55 N. H. 619; Am. Depot Co. v. Sheldon, 17 Blatch. 210; Stone v. Palmer, 28 Mo. 539. It seems that the court will presume that a person who signs as "Acting Commissioner" holds such office, in the absence of evidence to the contrary. Woodworth v. Hall, 1 Wood. & M. 248. Letters written by an applicant for a patent, when properly certified as papers remaining in the department, are admissible in evidence. Pettibone v. Derringer, 4 Wash. C. C. 215, 219. The documents which make up the original papers belong to the public archives, and a duly certified copy thereof is competent evidence, although some of these documents may contain private stipulations between the parties concerned. Hanrick v. Barton, 16 Wall. 166. Putting in evidence the file wrapper of a patent for which priority of invention is claimed, for the purpose of contradicting testimony of the inventor as to the date of the invention, does not make the depositions contained therein evidence in the case for all purposes. Richardson v. Campbell, 72 Fed. R. 525. A certified copy of a patent surrendered and canceled is admissible to show that an improvement subsequently patented is not original, although the certificate does not show when it was canceled, or how, or for what defect. Delano v. Scott, Gilp. 489. A certified copy of an assignment has been held to be not even *prima facie* evidence of the genuineness of the original and of the correctness of the copy of the record. Mayor, etc. City of New

"Copies of the specifications and drawings of foreign letters-patent, certified as provided in the preceding secction, shall be *prima facie* evidence of the fact of the granting of such letters-patent, and of the date and contents thereof."[20] "The printed copies of specifications and drawings of patents, which the Commissioner of Patents is authorized to print for gratuitous distribution, and to deposit in the capitols of the States and Territories, and in the clerk's offices of the District Courts, shall, when certified by him and authenticated by the seal of his office, be received in all courts as evidence of all matters therein contained."[21]

"Extracts from the journals of the Senate, or of the House of Representatives, and of the executive journal of the Senate when the injunction of secrecy is removed, certified by the secretary of the Senate or by the clerk of the House of Representatives, shall be admitted as evidence in the courts of the United States, and shall have the same force and effect as the originals would have if produced and authenticated in court."[22]

"Copies of all official documents and papers in the office of any consul, vice-consul, or commercial agent of the United States, and of all official entries in the books or records of any such office, certified under the hand and seal of such officer, shall be admitted in evidence in the courts of the United States."[23]

York v. American Cable Ry. Co. (C. C. A.), 60 Fed. R. 1016; Paine v. Trask (C. C. A.), 56 Fed. R. 233; Lee v. Blandy, 1 Bond, 361; Brooks v. Jenkins, 3 McLean, 432; Parker v. Haworth, 4 McLean, 370. A certified copy of a transfer not required by law to be recorded is not proof of the transfer. Sherman v. Champlain Trans. Co., 31 Vt. 162. He who desires a copy of papers filed in the patent office must make demand therefor in a proper manner, without insulting or abusing the officers; but if a second demand is properly made, the commissioner cannot refuse to comply because of the applicant's previous improper conduct. Boyden v. Burke, 14 How. 575.

[20] U. S. R. S., § 893. A copy of a French patent certified by the director of the Conservatoire National des Arts et Métiers of France, under the seal of that department, verified by the minister of agriculture and commerce, and the minister of foreign affairs, under their seals, but not by the great seal of France, may be admitted in evidence. Schoerken v. Swift C. & B. Co., 7 Fed. R. 469, 471. See Deflorz v. Reynolds, 17 Blatchf. 436.

[21] U. S. R. S., § 894.

[22] U. S. R. S., § 895. See Field v. Clark, 143 U. S. 649, 679; U. S. v. Burr, 159 U. S. 78, 85.

[23] U. S. R. S., § 896; The Atlantic, Abbott's Adm. 451. The certificate

"The transcripts into new books, made by the clerks of the District Courts in the several districts of Texas, Florida, Wisconsin, Minnesota, Iowa, and Kansas, in pursuance of the act of June twenty-seven, eighteen hundred and sixty-four, chapter one hundred and sixty-five, from the records and journals transferred by them respectively, under the said act, to the clerks of the Circuit Courts in the said districts, when certified by the clerks respectively, making the same to be full and true copies from the original books, shall have the same force and effect as records as the originals. And the certificates of the clerks of said Circuit Courts, respectively, of transcripts of any of the books or papers so transferred to them, shall be received in evidence with the like effect as if made by the clerk of the court in which the proceedings were had."[24] "The transcripts into new books made by the clerks of the Circuit and District Courts for the western district of North Carolina, in pursuance of the act of June four, eighteen hundred and seventy-two, chapter two hundred and eighty-two, when certified by the clerks respectively, making the same to be full and true copies from the original books, shall have the same force and effect as records as the originals. And the certificates of the clerks of said Circuit and District Courts respectively, of transcripts

of a consul is competent evidence to prove his official acts, but not acts which are not official or not within his personal knowledge. Brown v. The Independence, Crabbe, 54. The consul's certificate is competent to prove that the ship's papers were lodged with him, U. S. v. Mitchell, 2 Wash. 478; that a seaman was discharged in a foreign court with his own consent, Lamb v. Briard, Abb. Adm. 367; and when it sets out all the essential facts it is *prima facie* evidence that a master violated the law in refusing to receive a discharged seaman in a foreign port, Matthews v. Offley, 3 Sumn. 115. A consular certificate is not competent to prove facts to justify imprisonment of a seaman by the master in a foreign port, Johnson v. The Carolanus, Crabbe, 239. *Cf.* The W. F. Babcock (C. C. A.), 85 Fed. R. 978. Nor to authenticate the record of the condemnation of a vessel in a court of vice-admiralty, Catlett v. Pacific Ins. Co., 1 Paine, 594; nor to prove a foreign law or the correctness of a translation, Church v. Hubbard, 2 Cranch, 187; nor to prove any fact between third persons, unless made so by statute, U. S. v. Mitchell, 2 Wash. 478; The Alice, 12 Fed. R. 923; Stein v. Bowman, 13 Pet. 209; Levy v. Burley, 2 Sumn. 355; nor to prove a copy of a bill of lading in another's possession, The Alice, 12 Fed. R. 923. A certificate with an undecipherable seal and signature is not admissible in evidence. The Atlantic, Abb. Adm. 451.

[24] U. S. R. S., § 897.

of any of the said transcribed records, shall also be received in evidence with the like effect as if made by the proper clerk from the originals from which such records were transcribed."[25] "When the record of any judgment, decree, or other proceeding of any court of the United States is lost or destroyed, any party or person interested therein may, on application to such court, and on showing to its satisfaction that the same was lost or destroyed without his fault, obtain from it an order authorizing such defect to be supplied by a duly certified copy of the original record, where the same can be obtained; and such certified copy shall thereafter have, in all respects, the same effect as the original record would have had."[26] "When any such record is lost or destroyed, and the defect cannot be supplied as provided in the preceding section, any party or person interested therein may make a written application to the court to which the record belonged, verified by affidavit, showing such loss or destruction; that the same occurred without his fault or neglect; that certified copies of such record cannot be obtained by him; and showing also the substance of the record so lost or destroyed, and that the loss or destruction thereof, unless supplied, will or may result in damage to him. The court shall cause said application to be entered of record, and a copy of it shall be served personally upon every person interested therein, together with a written notice that on a day therein stated, which shall not be less than sixty days after such service, said application will be heard; and if, upon such hearing, the court is satisfied that the statements contained in the application are true, it shall make and cause to be entered of record an order reciting the substance and effect of said lost or destroyed record. Said order shall have the same effect, so far as concerns the party or person making such application and the persons served as above provided, but subject to intervening rights, which the original record would have had, if the same had not been lost or destroyed."[27] "When any cause has been removed to the Supreme Court, and the original record thereof is afterward lost, a duly certified copy of the record remaining in said court may be filed in the court from

[25] U. S. R. S., § 898.

[26] U. S. R. S., § 899; Cornett v. Williams, 20 Wall. 226.

[27] U. S. R. S., § 900.

which the cause was removed, on motion of any party or person claiming to be interested therein; and the copy so filed shall have the same effect as the original record would have had if the same had not been lost or destroyed."[28] "In any proceedings in conformity with law to restore the records of any court of the United States which have been or may be hereafter lost or destroyed, the notice required may be served on any non-resident of the district in which such court is held anywhere within the jurisdiction of the United States, or in any foreign country; the proof of service of such notice, if made in a foreign country, to be certified by a minister or consul of the United States in such country, under his official seal."[29] "A certified copy of the official return, or any other official paper of the United States attorney, marshal, or clerk, or other certifying or recording officer of any court of the United States, made in pursuance of law, and on file in any department of the government, relating to any cause or matter to which the United States was a party in any such court, the record of which has been or may be lost or destroyed, may be filed in the court to which it appertains, and shall have the same force and effect as if it were an original report, return paper, or other document made to or filed in such court; and in any case in which the names of the parties and the date and amount of judgment or decree shall appear from such return paper, or document, it shall be lawful for the court in which they are filed to issue the proper process to enforce such decree or judgment, in the same manner as if the original record remained in said court. And in all cases where any of the files, papers, or records of any court of the United States have been or shall be lost or destroyed, the files, records, and papers which, pursuant to law, may have been or may be restored or supplied in place of such records, files, and papers, shall have the same force and effect to all intents and purposes, as the originals thereof would have been entitled to."[30] "Whenever any of the records or files in which the United States are interested of any court of the United States have been or may be lost or destroyed, it shall be the duty of the attorney of the

[28] U. S. R. S., § 901.

[29] U. S. R. S., § 902, as amended by 20 St. at L. 277.

[30] U. S. R. S., § 903, as amended by 20 St. at L. 277.

United States for the district or court to which such files and records belong, so far as the judges of such courts respectively shall deem it essential to the interests of the United States that such records and files be restored or supplied, to take such steps, under the direction of said judges, as may be necessary to effect such restoration or substitution, including such dockets, indices, and other books and papers as said judges shall think proper. Said judges may direct the performance, by clerks of said courts respectively and by the United States attorneys, of any duties incident thereto; and said clerks and attorneys shall be allowed such compensation, for services in the matter and for lawful disbursements, as may be approved by the Attorney-General of the United States, upon a certificate by the judges of said courts stating that such claim for services and disbursements is just and reasonable; and the sum so allowed shall be paid out of the judiciary fund."[21]

"The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory, or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."[22]

[21] U. S. R. S., § 904, as amended by 20 St. at L. 277.

[22] U. S. R. S., § 905. The cases construing this section of the Revised Statutes are very numerous, and may be found collected in Greenleaf on Evidence, §§ 504–506. This statute applies to the Federal courts as well as to the State courts. Gormley v. Bunyan, 138 U. S. 623, 635; Mills v. Duryee, 7 Cranch, 481; Galpin v. Page, 3 Saw. 93. It will be presumed that the seal of a State was annexed to a paper by the proper officer under due authority. United States v. Johns. 4 Dall. 412; s. c., 1 Wash. C. C. 363; U. S. v. Amedy, 11 Wheat. 392. The certificate must show that the person who signed it as judge was, when he signed it, the judge, chief justice, or presiding magistrate of the court in which the judgment is of record. Stewart v. Gray, Hemps. 94; U. S. v. Biebusch, 1 McCrary, 42,

"All records and exemplifications of books, which may be kept in any public office of any State or Territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other State or Territory, or in any such country, by the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish, or district in which such office may be kept, or of the governor, or secretary of state, the chancellor or keeper of the great seal, of the State or Territory, or country, that the said attestation is in due form, and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or, if given by such governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the State, Territory, or country aforesaid in which it is made. And the said records and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the State,

1 Fed. R. 213. If the laws of a State show that the court in which the judgment was rendered consisted of but a single judge, it is not material in a Federal court that the certificate to the attestation of the clerk did not show that the certifying officer was the sole judge, chief justice, or presiding magistrate. Bennett v. Bennett, Deady, 299. The certificate of the judge that he is "one of the judges" of the court is insufficient. Stewart v. Gray, Hemps. 94; Gardner v. Lindo, 1 Cranch C. C. 78. The judge should certify that the attestation is in due form according to the laws of the State. Craig v. Brown, Pet. C. C. 352. If a clerk of a court certifies at the foot of a paper which purports to be a record that the foregoing is truly taken from the record of proceedings of his court, and if the judge, chief justice, or presiding magistrate certifies that such attestation of the clerk is in due form of law, it is to be presumed that the paper so certified is in due form, and is a full copy of the proceedings in the case, and is admissible in evidence; but if it proves to be a mere transcript of minutes taken from the docket of the court, it is not admissible. Ferguson v. Harwood, 7 Cranch, 408. *Cf.* Woodbridge & T. Eng. Co. v. Ritter, 70 Fed. R. 677. If a judgment has been recovered against a corporation by a wrong name, there may be a recovery in a suit on such judgment in another State brought against it by the proper name. La Fayette Ins. Co. v. French, 18 How. 404.

Territory, or country, as aforesaid, from which they are taken."[33]

"It shall be lawful for any keeper or person having the custody of laws, judgments, orders, decrees, journals, correspondence, or other public documents of any foreign government or its agents, relating to the title to lands claimed by or under the United States, on the application of the head of one of the Departments, the Solicitor of the Treasury, or the Commissioner of the General Land Office, to authenticate copies thereof under his hand and seal, and to certify them to be correct and true copies of such laws, judgments, orders, decrees, journals, correspondence, or other public documents, respectively; and when such copies are certified by an American minister or consul, under his hand and seal of office, to be true copies of the originals, they shall be sealed up by him and returned to the Solicitor of the Treasury, who shall file them in his office, and cause them to be recorded in a book kept for that purpose. A copy of any such law, judgment, order, decree, journal, correspond-

[33] U. S. R. S., § 906. See also Snyder v. Wise, 10 Pa. St. 157; Lawrence v. Gaultney, Cheves Law (S. C.), 7; King v. Dale, 2 Ill. 513; Henthorn v. Doe, 1 Blackf. (Ind.) 157; Russell v. Kearney, 27 Ga. 96; Paca v. Dutton, 4 Mo. 371; Karr v. Jackson, 28 Mo. 316; Grant v. Henry Clay Coal Co., 80 Pa. St. 208; and authorities cited in Bump's Fed. Proc., 617-619. This section does not impart to the authenticated State record anything more than "faith and credit," and does not extend the effect of a decision against a State to the United States, nor make an award or judgment which might be final against a State either obligatory in law or conclusive against the United States. Williams v. U. S., 137 U. S. 113, 186. Where a deed of land in Texas had been executed in accordance with the civil laws in Louisiana, and a copy furnished to the grantee as a second original, this copy was admitted in evidence, upon proof by the witness that he had examined the originals on file in the notary's book; that the copy was a true one; that the notary before whom the conveyance was executed was dead; that the witness knew the handwriting, which was genuine; that the witness knew the handwriting of one of the subscribing witnesses; that such witness was dead; and that the signature of such subscribing witness was genuine. White v. Bromley, 20 How. 235, 250. A pardon certified under the great seal of the State was admitted in evidence. U. S. v. Wilson, Baldw. 78. A copy of a survey certified by the register, by the judge, and by the Secretary of State under the great seal, was admitted in evidence. Smith v. Redden, 5 Harr. (Del.) 321. The clerk's certificate should show that the judge is the presiding judge, or that he is the presiding judge for the district. Paca v. Dutton, 4 Mo. 370. This statute does not apply to court records. Tarlton v. Briscoe, 1 A. K. Marsh. (Ky.) 67; U. S. R. S., § 905; Snyder v. Wise, 10 Pa. St. 157; Law v. Gaultney, Cheves (S. C.) Law, 7.

ence, or other public document, so filed, or of the same so recorded in said book, may be read in evidence in any court, where the title to land claimed under or by the United States may come into question, equally with the originals."[34]

"The edition of the laws and treaties of the United States, published by Little & Brown, shall be competent evidence of the several public and private acts of Congress, and of the several treaties therein contained, in all the courts of law and equity and of maritime jurisdiction, and in all the tribunals and public offices of the United States, and of the several States, without any further proof or authentication thereof."[35]

The publication by the government printing office of the supplements to the Revised Statutes are *prima facie* evidence, and the publication by that office of the pamphlet copies of the statutes and the bound copies of the acts of each Congress are "legal evidence of the laws and treaties therein contained in all courts of the United States and of the several States therein."[36]

"In suits or informations brought, where any seizure is made pursuant to an act providing for or regulating the collection of duties on imports or tonnage, if the property is claimed by any person, the burden of proof shall lie upon such claimant: provided that probable cause is shown for such prosecution, to be judged of by the court."[37]

§ 269. Definition and use of an affidavit.—An affidavit is a declaration upon oath or affirmation before some persons having competent and lawful power and authority to administer the same. Affidavits are used in a suit in equity in three ways. In certain cases they must be annexed to a bill before it can be properly filed;[1] certain documents may be proved by them at the hearing;[2] and they are used in support of interlocutory applications.[3] The manner of their use has been already de-

[34] U. S. R. S., § 907; Ten Cases v. U. S., 34 Fed. R. 101; Chadwick v. U. S., 3 Fed. R. 753; Williams v. U. S., 137 U. S. 113, 186.

[35] U. S. R. S., § 908.

[36] 28 St. at L. 601; 26 St. at L. 50; 21 St. at L. 308.

[37] U. S. R. S., § 909. See also Locke v. U. S., 7 Cranch, 339; The Luminary, 8 Wheat. 407; Wood v. U. S., 16 Pet. 342; The John Griffin, 15 Wall. 29; Clifton v. U. S., 4 How. 242; Taylor v. U. S., 3 How. 197; Buckley v. U. S., 4 How. 251; Cliquot's Champagne, 3 Wall. 114; U. S. v. Walla Walla, 44 Fed. R. 796; The Coquitlam, 57 Fed. R. 706, 714.

§ 269. [1] See § 87.

[2] See § 269.

[3] See ch. XV

scribed.[4] It is unsettled whether the court has power to compel any one to have his affidavit taken,[5] or to cross-examine an affiant,[6] except, possibly, by means of a feigned issue.

§ 270. Manner of verifying an affidavit.—An affidavit must be sworn to; unless the affiant is conscientiously scrupulous of taking an oath, when he may, in lieu thereof, make solemn affirmation of the truth of the facts stated by him.[1] If the deponent be blind or unable to read, the affidavit must be read over to him by the officer before whom he swears to its truth.[2] An affidavit, if made within the United States, must be verified before a judge of the court in which it is to be used, or a United States commissioner, or a notary public.[3] If made without the United States, it may be verified before any secretary of legation, or consular officer within the limits of his legation, consulate, or commercial agency;[4] or, perhaps, before any person who, by the laws of the country in which the affidavit is made, is authorized to administer an oath or affirmation.[5] It has been said to be irregular to have an affidavit entitled in a suit in equity sworn to before the bill is filed.[6]

§ 271. Title of an affidavit.—An affidavit should be correctly entitled in the cause or matter in which it is made.[1] For, otherwise, it is said that the affiant cannot be convicted of perjury if his statements are false.[2] But, it seems that, if there are several parties on either side, or both sides, it will be sufficient

[4] *Supra*, §§ 198, 232.

[5] See Hammerschlag Mfg. Co. v. Judd, 26 Fed. R. 292; Bacon v. Magee, 7 Cowen (N. Y.), 515; Day v. Boston B. Co., 6 Law R. (N. S.) 329. As to the right to compel a party to file an affidavit which he has read upon a motion, see Sinnot v. First Nat. Bank, 84 App. Div. 161.

[6] See Day v. Boston B. Co., 6 Law R. (N. S.) 329; Hammerschlag Mfg. Co. v. Judd, 26 Fed. R. 292.

§ 270. [1] Equity Rule 91; U. S. R. S., §§ 1, 5018. *Cf.* Loney v. Bailey, 43 Md. 10.

[2] Matter of Christie, 5 Paige (N. Y.), 242.

[3] U. S. R. S., §§ 725, 945; L. 1876, ch. 304; 19 St. at L. 206; Haight v. Morris Aq., 4 Wash. C. C. 601. *Cf.* 27 St. at L. 7.

[4] U. S. R. S., § 1750.

[5] Pinkerton v. Barnsley C. Co., 3 Y. & J. 277, n.

[6] Baldwin v. Bernard, 9 Blatchf., note; s. c., Fed. Cas. No. 797. See Blake Cr. Co. v. Ward, Fed. Cas. No. 1,505.

§ 271. [1] Hawley v. Donnelly, 8 Paige (N. Y.), 415; Stafford v. Brown, 4 Paige (N. Y.), 360; Goldstein v. Whelan, 62 Fed. R. 124. But see Bowman v. Sheldon, 5 Sand. (N. Y.) 657; Shook v. Rankin, 6 Biss. 477; s. c., Fed. Cas. 12,804. *Cf. supra*, § 270.

[2] Hawley v. Donnelly, 8 Paige (N. Y.), 415.

to entitle it in the name of a single plaintiff and defendant, and after each to insert the word "others" or "another," according to the circumstances of the case.[3] The omission of a party's christian name will not be a fatal defect.[4] If the affidavit is correctly entitled when made, it can still be used after the title of the cause has been subsequently changed.[5] If an affidavit of service be attached to papers which are themselves correctly entitled, it needs no separate title.[6] An affidavit made or entitled in one cause cannot, it has been held, be used in another;[7] unless, perhaps, when the affiant is dead, insane, imbecile, or beyond the jurisdiction of the court.

§ 272. Form of an affidavit.—Every affidavit should begin with the venire,—that is, the name of the county,[1] and in a Federal court the name of the judicial district;[2] and if sworn to elsewhere than in that where the court is held, with the name of the State where it is taken; which is usually followed by the abbreviation *Ss.* for *scilicet*, or the English words *to wit*. Otherwise, it has been held, though not by a Federal court, that it may be disregarded as a nullity, even though the residence of an officer before whom it is sworn appear in the jurat.[3] The English rule was that in all affidavits the true place of residence, description, and addition of every person swearing to the same, must be inserted; unless the affidavits were made by parties to the cause, who might describe themselves, in the affidavit, as the above-named plaintiff, or defendant, without specifying any residence, or addition, or other description.[4]

[3] White v. Hess, 8 Paige (N. Y.), 544; Seymour v. Bailey, 66 Ill. 288. But see Arnold v. Nye, 11 Mich. 456.

[4] Maury v. Van Arnum, 1 Hill (N. Y.), 370.

[5] Hawes v. Bamford, 9 Sim. 653.

[6] Anon., 4 Hill (N. Y.), 597.

[7] Lumbrozo v. White, 1 Dick. 150; Daniell's Ch. Pr. 1774; Milliken v. Selye, 3 Denio (N. Y.), 54; Stacy v. Farnham, 2 How. Pr. (N. Y.) 26. But see Barnard v. Heydrick, 49 Barb. (N. Y.) 62, 72; s. c., 2 Abbott's Pr. N. S. (N. Y.) 47; Langston v. Wetherell, 14 Mees. & W. 104.

§ 272. [1] Belden v. Devoe, 12 Wend. (N. Y.) 223.

[2] Sterrick v. Pugsley, 11 Flipp. 350.

[3] Cook v. Staats, 18 Barb. (N. Y.) 407; Lane v. Morse, 6 How. Pr. (N. Y.) 394; Burns v. Doyle, 28 Wis. 460; Smith v. Richardson, 1 Utah, 194; Barhydt v. Alexander, 59 Mo. 189. But see Mosher v. Heydrick, 45 Barb. (N. Y.) 549; s. c., 30 How. Pr. (N. Y.) 161; Stone v. Williamson, 17 Ill. App. 175; Young v. Young, 18 Minn. 90; State v. Henning, 3 S. D. 492.

[4] Daniell's Ch. Pr. (2d Am. ed.) 1775. See also Hinde's Pr. 451; Crockett v. Bishton, 2 Madd. 446.

This rule, however, is not always adhered to or insisted upon by practitioners in the courts of the United States. The English rule was that the stating part of the affidavit must be preceded by the statement that the deponent was duly sworn.[5] The affidavit should state "sufficient to sustain the case made by the motion or petition of which it is the groundwork."[6] Its statements must be made with sufficient certainty, and with all necessary circumstances of time, place, manner, and other material incidents.[7] When, however, the affiant deposes to words spoken, the addition "or to that effect" is not improper.[8] Special fullness is required of affidavits of service.[9] When the affidavit states matters not necessarily within the deponent's knowledge, it should show how he knows them to be true.[10] An affidavit should state facts and not conclusions of law;[11] and must be pertinent, material, and not scandalous.[12] The court may, upon examination of the paper, order such matter expunged with costs, to be paid by the party or solicitor seeking to use the same;[13] or a reference may be ordered to determine whether the statements in it are proper.[14] A reference can only be demanded upon exceptions in writing similar to those to a pleading;[15] and the filing or reading of affidavits in opposition to such parts of his opponent's affidavits as are excepted to may be construed as a waiver of the exceptions.[16] Pending a reference concerning it, an affidavit cannot be used except by leave of the court, which is usually granted only upon terms.[17]

§ 273. Execution of an affidavit.— It is usual, though it seems not indispensable, for the affiant to subscribe his chris-

[5] Phillips v. Prentice, 2 Hare, 542; Daniell's Ch. Pr. (2d Am. ed.) 1776.

[6] Daniell's Ch. Pr. (2d Am. ed.) 1776; Hinde's Pr. 451; Van Wyck v. Reid, 10 How. Pr. (N. Y.) 366.

[7] Sea Insurance Co. v. Stebbins, 8 Paige (N. Y.), 565; Meach v. Chappell, 8 Paige (N. Y.), 135.

[8] Ayliffe v. Murray, 2 Atk. 58, 60.

[9] Hinde's Pr. 453.

[10] U. S. v. Moore, 2 Low. 232. *Cf.* Crowns v. Vail, 51 Hun (N. Y.), 204; Cook v. de la Garza, 13 Tex. 431.

[11] Powell v. Kane, 5 Paige (N. Y.), 265. *Cf.* Spies v. Munroe, 35 App. Div. 527, 528. An allegation that one is a creditor is a conclusion of law. Wallace v. Chicago & E. S. Co., 46 Ill. App. 571.

[12] Powell v. Kane, 5 Paige (N. Y.), 265.

[13] Powell v. Kane, 5 Paige (N. Y.), 265; Ex parte Smith, 1 Atk. 139.

[14] Daniell's Ch. Pr. (2d Am. ed.) 1777. See § 68.

[15] Daniell's Ch. Pr. (2d Am. ed.) 1777. See § 68.

[16] Bickford v. Skewes, 8 Sim. 206; Daniell's Ch. Pr. 1777.

[17] Pearse v. Brook, 3 Beav. 337; Daniell's Ch. Pr. 1777.

tian name and surname at the foot of the affidavit.[1] In England the signature had to be on the left side of the page;[2] but in this country it is usually at the right. In one case where a marksman had signed with his name at length, his hand having been guided for that purpose, the affidavit was ordered taken off the file.[3] The jurat, which is indispensable, is placed upon the opposite side from the signature. It is usually in substantially the following form: "Sworn to before me this —— day of ——, 19—." If the affiant be blind or a marksman, the jurat should be in substance thus: "Sworn," &c., "the whole of the above affidavit having been first read over and explained to the said A. B., who appeared perfectly to understand the same, he made his mark in my presence."[4] If the affiant have been previously found by the inquisition of a jury to be an idiot, a lunatic, or imbecile, the officer before whom the affidavit is sworn should state in the jurat that he has examined the deponent for the purpose of ascertaining the state of his mind, and that the latter was apparently of sound mind and capable of understanding the nature and contents of the affidavit.[5] The omission of the addition to the officer's signature of his title,[6] and even the omission of his signature, will not, it seems, be a fatal defect.[7] It is usual and more prudent, even if not absolutely essential, for the officer to mark with his initials all interlineations and erasures in the body of the affidavit.[8]

§ 274. Competency of witnesses.— The testimony of witnesses may be taken either solely for use in the court taking the same or for use in other courts as well. The same rules as to competency prevail at law and in equity.[1] The Revised

§ 273. [1] Noble v. U. S., Dev. (C. C. A.) 83; Haff v. Spicer, 3 Caines (N. Y.), 190; Jackson ex dem. Kenyon v. Virgil, 3 J. R. (N. Y.) 540; Soule v. Chase, 1 Rob. (N. Y.) 222; Hitsman v. Garrard, 1 Harr. (N. J.) 124; Shelton v. Berry, 19 Tex. 154; Watts v. Womack, 44 Ala. 605; Alford v. McCarmac, 90 N. C. 151; Gill v. Ward, 23 Ark. 16; Redus v. Wofford, 4 Sm. & M. (Miss.) 579; Bates v. Robinson, 8 Iowa, 318. But see Laimbeer v. Allen, 2 Sand. (N. Y.) 648; Hathaway v. Scott, 11 Paige, 173.

[2] Daniell's Ch. Pr. (2d Am. ed.) 1778.

[3] —— v. Christopher, 11 Sim. 409.

[4] Daniell's Ch. Pr. (2d Am. ed.) 1776; Matter of Christie, 5 Paige (N. Y.), 242.

[5] Matter of Christie, 5 Paige (N. Y.), 242.

[6] Hunter v. Le Conte, 6 Cowen (N. Y.), 728; People v. Rensselaer C. P., 6 Wend. (N. Y.) 543.

[7] Chase v. Edwards, 2 Wend. (N. Y.) 283.

[8] Daniell's Ch. Pr. (2d Am. ed.) 1777; Didier v. Warner, 1 Code R. (N. Y.) 42.

§ 274. [1] Nash v. Williams, 20 Wall. 226.

Statutes provide that, "in the courts of the United States, no witness shall be excluded in any action on account of color, or in any civil action because he is a party or interested in the issue tried: *provided*, that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects, the laws of the State in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty."[2] This statute has been said to be remedial, and to deserve, therefore, a liberal construction.[3] It applies as well to causes to which the United States is a party, as to those between private persons.[4] It does not apply to criminal cases.[5] It allows a party to be examined *de bene esse* by his adversary in case where a stranger could be so examined.[6] It allows a party to testify in his own behalf, as well as when called upon by the other.[7] It does not prevent a person, not a party but interested in the result of a suit, from testifying against an executor in a case when, if a party, he could not do so; although the State law would exclude such testimony.[8] Where an administratrix had commenced a suit and subsequently resigned, and the suit was continued by her successor, it was held that she who began the suit was a competent witness as to transactions with the testator.[9] This statute

[2] U. S. R. S., § 858; James v. Atlantic D. Co., 3 Cliff. 614; Monongahela Nat. Bank v. Jacobus, 109 U. S. 275; Whitney v. Fox, 166 U. S. 637; Hobbs v. McLean, 117 U. S. 567; Jacksonville M. P. Py. & N. Co. v. Hooper, 160 U. S. 514; Slavens v. No. Pac. Ry. Co. (C. C. A.), 97 Fed. R. 255; McMullen v. Ritchie, 64 Fed. R. 253. See *infra*, § 372.

[3] Texas v. Chiles, 21 Wall. 488.

[4] Green v. U. S., 9 Wall. 655. *Contra*, Jones v. U. S., 1 Ct. Cl. 383.

[5] U. S. v. Reid, 12 How. 361; Logan v. U. S., 144 U. S. 263; U. S. v. Hall, 53 Fed. R. 352; s. c., C. C. A.; s. c., U. S. App.

[6] Lowrey v. Knsworm, 66 Fed. R. 539. A deposition as to transactions with one, taken while the latter was alive, was admitted in evidence, although the latter died without giving his deposition, and the suit was revived in the name of the executors. McMullen v. Ritchie, 64 Fed. R. 253; Steiner v. Eppinger (C. C. A.), 61 Fed. R. 253.

[7] Stevens v. Bernays, 42 Fed. R. 488; Potter v. Third Nat. Bank, 102 U. S. 163.

[8] Snyder v. Fiedler, 139 U. S. 478.

[9] Lucas v. Brooks, 18 Wall. 436; Bassett v. U. S., 137 U. S. 496, 505. She cannot testify in the District of

does not allow a wife to testify in behalf of, or against, her husband, unless the laws of the State permit her so to do. For her incompetency by the common law was due not to interest, but to grounds of public policy.[10] It has been held that letters from a husband to his wife, whether competent evidence or not, must, if called for by subpœna, be produced and made a part of the record in equity for use in case of a review by appeal on the ruling as to their admissibility.[11] The cases where the court will require a party to testify, when otherwise he would not be obliged or allowed so to do, are rare. The court will usually only do so upon its own motion, and, if upon his suggestion, only after hearing the other party, if the latter object.[12] The court will do so, however, when a party has died after his testimony has been taken and before trial, and his administrator insists upon reading or submitting his testimony at the hearing.[13] The court will, it seems, not require such testimony to be taken, if by so doing it would adopt a rule of decision for a Federal court different from that prescribed by the legislature for courts of the State wherein it is held.[14] If there are several defendants, one of whom has a similar interest in the result to that of the complainant, such defendant cannot, by requiring the complainant to testify, obviate the effect of the proviso in this statute.[15] It seems that the admissions of a party are competent evidence against him, even though, upon his cross-examination, when testifying in his own behalf, he was not asked if he made them.[16] In the Federal courts, no matter what the decisions of the State courts may be, a verbal collateral agreement cannot be proven to vary, qualify, contradict, add to, or subtract from the absolute terms of a written instrument, in the absence of fraud, accident, or mistake; [17] nor to show by parol that payment was to be made in some other way than that specified in the written instrument.[18]

Columbia. Hopkins v. Grimshaw, 165 U. S. 342, 349.

[10] Lucas v. Brooks, 18 Wall. 436.

[11] Lloyd v. Pennie, 50 Fed. R. 4, 11. See *infra*, §§ 277, 284.

[12] Eslava v. Mazange, 1 Woods, 623.

[13] Mumm v. Owens, 2 Dill. 475.

[14] Robinson v. Mandell, 3 Cliff. 169.

[15] Eslava v. Mazange, 1 Woods, 623.

[16] The Stranger, 1 Brown's Adm. 281.

[17] Brown v. Spofford, 95 U. S. 474; Am. El. C. Co. v. Consumers' Gas Co., 47 Fed. R. 43, 46.

[18] Richardson v. Hardwick, 106 U. S. 252; Bast v. First Nat. Bank, 101 U. S. 93.

It has been held, in actions at common law, that the testimony of a physician as to information acquired while attending a patient in a professional capacity, when forbidden by the statutes of the State, should not be admitted in the Federal court there held;[19] that when a State statute authorized the admissibility in evidence of a notarial certificate of a form inadmissible at common law,[20] or of the indorsement of negotiable paper without proof of handwriting,[21] or of experts who based their opinion upon a comparison of writing in question with other writings treated as genuine by the adverse party,[22] the Federal court there held should follow such statutes; but that a State statute excluding the testimony of a witness on account of his interest in the controversy should be disregarded.[23] By statute, on the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors in the United States courts, Territorial courts, and courts-martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request, but not otherwise, be a competent witness.[24] The Revised Statutes provide that "no pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial

[19] Conn. Mut. L. Ins. Co. v. Union Tr. Co., 112 U. S. 250; Mutual Ben. Life Ins. Co. v. Robison, 58 Fed. R. 728. It was held that a State statute permitting confidential communications to an attorney to be put in evidence will not be followed at common law in a Federal court. Conn. Mut. L. Ins. Co. v. Schaefer, 94 U. S. 457; Liggett v. Glenn (C. C. A.), 51 Fed. R. 881. And that a contract between an attorney and his client is privileged and cannot be put in evidence, although on file in a court of probate. Liggett v. Glenn (C. C. A.), 51 Fed. R. 881. *Cf.* Mutual L. Ins. Co. v. Selby (C. C. A.), 72 Fed. R. 980; Edison El. L. Co. v. U. S. El. L. Co., 44 Fed. R. 294, 297, 299.

[20] Sims v. Hundley, 6 How. 1.

[21] M'Niel v. Holbrook, 12 Pet. 84.

[22] Green v. Terwilliger, 56 Fed. R. 884, 893.

[23] Potter v. National Bank, 102 U. S. 163; Goodwin v. Fox, 129 U. S. 601, 631. In civil actions at common law the Federal courts follow the rulings of the State courts as to the competency of evidence in the Fifth, Sixth and Seventh circuits. Hinds v. Keith (C. C. A.), 57 Fed. R. 10; Baltimore & O. R. Co. v. Rambo (C. C. A.), 59 Fed. R. 75; Stewart v. Morris (C. C. A.), 88 Fed. R. 461. *Contra* in the Eighth circuit. Union Pac. Ry. Co. v. Yates (C. C. A.), 79 Fed. R. 584.

[24] 20 St. at L. 30; Allison v. U. S., 160 U. S. 203; Wolfson v. U. S. (C. C. A.), 101 Fed. R. 430; s. c., 102 Fed. R. 134. It has been held that this does not render competent a defendant who, by a previous conviction of an infamous crime, had lost the privilege of testifying. U. S. v. Hollis, 43 Fed. R. 248.

proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture; provided that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid."[25] This does not deprive a witness of the right to refuse to give testimony that might tend to criminate him.[26] The Revised Statutes further provide that: "No testimony given by a witness before either House, or before any committee of either House of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege."[27] "No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined by either House of Congress, or by any committee of either House, upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous."[28] The rules regulating the production of documents by a subpœna *duces tecum* or otherwise have been previously explained.[29]

[25] U. S. R. S., § 860.

[26] Counselman v. Hitchcock, 142 U. S. 547; U. S. v. James, 60 Fed. R. 257. See Brown v. Walker, 161 U. S. 591; Ex parte Irvine, 74 Fed. R. 954; U. S. v. Price, 96 Fed. R. 960. A witness, at least if not a party to the suit, may be compelled to testify as to an infringement of a patent himself, when relevant, and is not shielded by the Constitution because he may thereby prove his own liability to treble damages. Masseth v. Johnston, 59 Fed. R. 618. A defendant when called by the complainant as a witness may be compelled to state whether he has in his possession a machine claimed to be an infringement of the plaintiff's patent, although the plaintiff has not previously made out a *prima facie* case of infringement. Delamater v. Reinhardt, 43 Fed. R. 76, S. D. N. Y. *Contra*, Celluloid Co. v. Crane Co., 3d Circuit. It has been held that the defendant cannot be compelled to disclose the names of confidential customers to whom he has furnished articles covered by the patent, at least before an accounting has been ordered. Roberts v. Walley, 14 Fed. R. 167. As to the admissibility of evidence illegally obtained, see U. S. v. Wong Quong, 94 Fed. R. 832; criticised N. Y. L. J., Sept. 22, 1899.

[27] U. S. R. S., § 859.

[28] U. S. R. S., § 103.

[29] *Supra*, § 267. It was held that a witness compelled to testify before a pension examiner without notice or knowledge of his constitutional privilege cannot be indicted for perjury thereupon. U. S. v. Bell, 81 Fed. R. 880.

§ 275. Subpœnas ad testificandum.— The attendance of a witness is usually compelled in equity as in law by the service of a subpœna *ad testificandum*, and the payment of his fees and mileage.[1] A subpœna *ad testificandum* is substantially in the same form in equity as in law. When issued from a court of the United States, it must be under the seal of the court, and signed by the clerk; and is usually also signed by the solicitors of the party at whose request it issues. Those issued from the Supreme Court or a Circuit Court must bear *teste* from the day of such issue of the Chief Justice of the United States, or, when that office is vacant, of the associate justice next in precedence.[2] Those issuing from a District Court must bear *teste* of the judge, or, when that office is vacant, of the clerk thereof.[3] By the common law, the names of but four witnesses could be included in one subpœna.[4] The Revised Statutes, however, provide that, "to save unnecessary expense, it shall be the duty of the clerk to insert the names of as many witnesses in a cause in such subpœna as convenience in serving the same will permit."[5] If the witness can be served within the jurisdiction of the court where the suit is pending, or within a hundred miles of the place of holding that court, the subpœna may be issued from its clerk's office.[6] If he cannot, and it is desired to take his testimony *de bene esse* under the acts of Congress,[7] application for the issue of the subpœna must be made to the court of the district in which the examination is to be made.[8] It has been held that Congress has no power to authorize or compel the courts of the United States to issue subpœnas or punish for contempt witnesses before a Congressional Commission, such as the Pacific Railway Commission,[9] or the Interstate Commerce Commission,[10] or an executive officer.[11] "Witnesses

§ 275. [1] For the amount of his fees and mileage, see § 333.

[2] U. S. R. S., §§ 911, 912.

[3] U. S. R. S., §§ 911, 912.

[4] Erwin v. U. S., 37 Fed. R. 470, 490.

[5] U. S. R. S., § 829; Erwin v. U. S., 37 Fed. R. 470, 490.

[6] U. S. R. S., § 876.

[7] See *infra*, §§ 286, 287.

[8] U. S. R. S., § 863; U. S. v. Tilden, 25 Int. Rev. R. 352; Ex parte Humphrey, 2 Blatch. 228; Henry v. Ricketts, 1 Cranch, C. C. 580; Ex parte Peck, 3 Blatchf. 118. See *infra*, § 276.

[9] In re Pac. Ry. Com., 32 Fed. R. 241.

[10] In re Interstate Commerce Commission, 53 Fed. R. 476.

[11] In re McLean, 37 Fed. R. 648. *Cf.* U. S. R. S., § 4906; Ex parte Moses, 53 Fed. R. 346. General courts-martial are authorized by statute to issue subpœnas to witnesses within the judicial district. 31 St. at L. —,

who are required to attend any term of a Circuit or District Court on the part of the United States, shall be subpœnaed to attend to testify generally on their behalf, and not to depart the court without leave thereof, or of the district attorney; and under such process they shall appear before the grand or petit jury, or both, as they may be required by the court or district attorney."[12] It has been held that a witness cannot be compelled by subpœna to produce the patterns of the castings of a stove, which are in his possession.[13]

§ 276. Service of a subpœna ad testificandum.— A subpœna to appear and testify may be served by the marshal of the court, or by any other person acting as the agent of the party calling the witness.[1] The Revised Statutes provide that "subpœnas for witnesses who are required to attend a court of the United States, in any district, may run into any other district; *provided*, that in civil causes the witnesses living out of the district in which the court is held do not live at a greater distance than one hundred miles from the place of holding the same."[2] A witness' attendance at a court more than one hundred miles from the place where he lives cannot be compelled by the service of a subpœna upon him within the district, when he has been enticed there by false pretenses;[3] or while there to attend either as a party, a witness, an attorney, or a counsel during a suit or other judicial proceeding in a State[4] or Federal court;[5] or, while traveling upon his way to or from Congress, if he be a member thereof;[6] or if there in the course of the performance of any public duty.[7]

[12] U. S. R. S., § 877.

[13] In re Shephard, 3 Fed. R. 12. A court of equity will not, even if it has the power, on complainant's motion, require respondent to repeat certain experiments under an alleged anticipating patent, in the presence of plaintiff's witnesses, except when so extraordinary a course is plainly necessary. Simonds R. M. Co. v. Hathorn Mfg. Co., 83 Fed. R. 490.

§ 276. [1] Schwabacker v. Reilly, 2 Dill. 127; Cummings v. Akron C. & P. Co., 6 Blatchf. 509; Miller v. Scott, 6 Phila. (Pa.) 484; Power v. Semmes, 1 Cranch, C. C. 247.

[2] U. S. R. S., § 876; Ex parte Beebee, 2 Wall. Jr. 127; Henry v. Ricketts, 1 Cranch, C. C. 580; U. S. v. Williams, 4 Cranch, C. C. 372.

[3] Union S. R. Co. v. Mathiesson, 2 Cliff. 304; Steiger v. Bonn, 4 Fed. R. 17.

[4] Juneau Bank v. M'Spedan, 5 Biss. 64; Matthews v. Tufts, 87 N. Y. 568. But see Blight v. Fisher, Pet. C. C. 41.

[5] Parker v. Hotchkiss, 1 Wall. Jr. 269; Matthews v. Tufts, 87 N. Y. 568. *Contra*, Blight v. Fisher, Pet. C. C. 41.

[6] Const., art. I, § 6; Miner v. Markham, 28 Fed. R. 887.

[7] See § 98.

"When a commission has been issued by any court of the United States for taking the testimony of a witness named therein at any place within any district or Territory, the clerk of any court of the United States for such district or Territory shall, on the application of either party to the suit, or of his agent, issue a subpœna for such witness, commanding him to appear and testify before the commissioner named in the commission, at any time and place stated in the subpœna; and if any witness, after being duly served with subpœna, refuses or neglects to appear, or, after appearing, refuses to testify, not being privileged from giving testimony, and such refusal or neglect is proven to the satisfaction of any judge of the court whose clerk issues such subpœna, such judge may proceed to enforce obedience to the process, or punish the disobedience, as any court of the United States may proceed in case of disobedience to process of subpœna to testify issued by such court."[8]

"When either party in such suit applies to any judge of a United States court in such district or Territory for a subpœna commanding the witness, therein to be named, to appear and testify before said commissioner, at the time and place to be stated in the subpœna, and to bring with him and produce to such commissioner any paper or writing or written instrument or book or other document supposed to be in the possession or power of such witness, and to be described in the subpœna, such judge, on being satisfied, by the affidavit of the person applying, or otherwise, that there is reason to believe that such paper, writing, written instrument, book, or other document is in the possession or power of the witness, and that the same, if produced, would be competent and material evidence for the party applying therefor, may order the clerk of said court to issue such subpœna accordingly. And if the witness, after being served with such subpœna, fails to produce to the commissioner, at the time and place stated in the subpœna, any such paper, writing, written instrument, book, or other document, being in his possession or power, and described in the subpœna, and such failure is proved to the satisfaction of said judge, he may proceed to enforce obedience to said process of subpœna, or punish the disobedience, in like manner as any

[8] U. S. R. S., § 868.

court of the United States may proceed in case of disobedience to like process issued by such court. When any such paper, writing, written instrument, book, or other document is produced to such commissioner, he shall, at the cost of the party requiring the same, cause to be made a correct copy thereof, or of so much thereof as shall be required by either of the parties."[9]

"No witness shall be required, under the provisions of either of the two preceding sections, to attend at any place out of the county where he resides, nor more than forty miles from the place of his residence, to give his deposition; nor shall any witness be deemed guilty of contempt for disobeying any subpœna directed to him by virtue of either of the said sections, unless his fee for going to, returning from, and one day's attendance at the place of examination are paid or tendered to him at the time of the service of the subpœna."[10]

[9] U. S. R. S., § 869.

[10] U. S. R. S., § 870.

U. S. R. S., § 871. "When a commission to take the testimony of any witness found within the District of Columbia, to be used in a suit depending in any State or Territorial or foreign court, is issued from such court, or a notice to the same effect is given according to its rules of practice, and such commission or notice is produced to a justice of the Supreme Court of said District, and due proof is made to him that the testimony of such witness is material to the party desiring the same, the said justice shall issue a summons to the witness, requiring him to appear before the commissioners named in the commission or notice, to testify in such suit, at a time and at a place within said District therein specified."

U. S. R. S., § 872. "When it satisfactorily appears by affidavit to any justice of the Supreme Court of the District of Columbia, or to any commissioner for taking depositions appointed by said court: first, that any person within said District is a material witness for either party in a suit pending in any State or Territorial or foreign court; second, that no commission nor notice to take the testimony of such witness has been issued or given; and, third, that, according to the practice of the court in which the suit is pending, the deposition of a witness taken without the presence and consent of both parties will be received on the trial or hearing thereof,—such officer shall issue his summons, requiring the witness to appear before him at a place within the District, at some reasonable time, to be stated therein, to testify in such suit."

U. S. R. S., § 873. "Testimony obtained under the two preceding sections shall be taken down in writing by the officer before whom the witness appears, and shall be certified and transmitted by him to the court in which the suit is pending, in such manner as the practice of that court may require. If any person refuses or neglects to appear at the time and place mentioned in the summons, or, on his appearance, refuses to testify, he shall be liable to the

The courts of the United States have no power to compel the attendance of persons to an examination in a foreign country. Such testimony, therefore, can only be taken against the will of a witness by the aid of, and by means of, the remedies administered by a foreign court.[11]

§ 277. Compelling a witness to testify.— When a witness, who has been properly served with a subpœna, refuses to attend, or when upon his examination he refuses to answer a relevant and proper question, against answering which he is not protected by his privilege, by the old rules he was liable "to be proceeded against in three ways: first, by attachment for contempt of the process of the court; secondly, by a special action on the case for damages at common law; and thirdly, by action on the statute 5 Eliz., c. 9, § 12, for the further recompense given by that statute, if it has been previously assessed by the court out of which the process issued."[1] In the Federal courts, a witness, if contumacious, may be punished for contempt,[2] and is also probably liable to an action for the damages sustained by his refusal. Upon an application to punish a witness for refusing to answer a question, the power of the officer before whom he is examined and the materiality of the question may both be considered.[3] Such an application must be made to the court which issued the subpœna.[4] Upon an application to punish a witness for contempt for failure to produce a paper in obedience to a subpœna *duces tecum*, it has been said that the materiality of the paper required will not be determined unless it is produced;[5] and if there is color for the claim that the paper is material, its production will be compelled, and the decision as to the admission of the paper in evidence postponed to the final hearing.[6] The rules concerning the privileges of witnesses and the materiality and rele-

same penalties as would be incurred for a like offense on the trial of a suit."

U. S. R. S., § 874. "Every witness appearing and testifying under the said provisions relating to the District of Columbia shall be entitled to receive for each day's attendance, from the party at whose instance he is summoned, the fees now provided by law for each day he shall give attendance."

[11] *Infra*, § 290.

§ 277. [1] Tidd's Pr. 788.

[2] U. S. R. S., § 725.

[3] Ex parte Peck, 8 Blatchf. 113; Ex parte Judson, 8 Blatchf. 89.

[4] In re Allis, 44 Fed. R. 216.

[5] Edison El. L. Co. v. U. S. El. L. Co., 44 Fed. R. 294.

[6] Edison El. L. Co. v. U. S. El. L. Co., 45 Fed. R. 55, 59.

vancy of evidence are substantially the same in equity as at law.[7] Care will be taken not to compel a witness to needlessly disclose his business secrets[8] and private papers.[9] Orders punishing for contempt witnesses who, in order to raise jurisdictional questions, have refused to be sworn or to answer certain questions, have been stayed their review by the Circuit Courts of Appeal.[10]

§ 278. Testimony taken in equity which may be used in other courts.— Testimony may be taken in a court of equity for use in other courts, as well as for its own use, by bills to perpetuate testimony[1] and bills to take testimony *de bene esse;*[2] and formerly, at least, testimony could be taken in a court of equity for use in another court by a bill of discovery.[3]

§ 279. Bills to perpetuate testimony.— "In any case where it is necessary in order to prevent a failure or delay of justice, any of the courts of the United States may grant a *dedimus potestatem* to take depositions according to common usage; and any Circuit Court, upon application to it as a court of equity, may, according to the usages of chancery, direct depositions to be taken *in perpetuam rei memoriam*, if they relate to any matters that may be cognizable in any court of the United States."[1] In order to obtain such a direction, the party wishing the testimony taken should file a bill to perpetuate testimony.[2] A bill to perpetuate testimony must contain all the facts necessary to give the court jurisdiction. It must state with reasonable certainty the subject-matter touching which the plaintiff is desirous of taking testimony,[3] and show that it is a matter which may be cognizable in a court of the United States.[4] It should also show that

[7] Stevens v. Cooper, 1 J. Ch. (N. Y.) 425.

[8] Robinson v. Phila. etc. R. Co., 28 Fed. R. 340, 342.

[9] Henry v. Travelers' Ins. Co., 35 Fed. R. 15. But see Lloyd v. Pennie, 50 Fed. R. 4, 11.

[10] In re Spofford, 62 Fed. R. 443; Butler v. Fayerweather (C. C. A.), 91 Fed. R. 458.

§ 278. [1] § 279.

[2] § 280.

[3] § 281.

§ 279. [1] U. S. R. S., § 866. Testimony may thus be taken before a Circuit Court while a case is pending in the Supreme Court or Circuit Court of Appeals on appeal from a decree sustaining a demurrer. Richter v. Union T. Co., 115 U. S. 55.

[2] N. Y. & B. C. P. Co. v. N. Y. C. P. Co., 9 Fed. R. 578.

[3] Story's Eq. Pl., §§ 300, 305.

[4] U. S. R. S., § 868; N. Y. & B. C. P. Co. v. N. Y. C. P. Co., 9 Fed. R. 578. But see Morris v. Morris, 2 Phill. 205, 208.

the plaintiff has some interest in the subject-matter, which may be endangered if the testimony in support of it is lost. A mere expectancy, however strong and well-founded, is not sufficient. It has been said, "Put the case as high as possible; that the party seeking to perpetuate the testimony is the next of kin of a lunatic; that the lunatic is intestate; that he is in the most helpless state, a moral and physical impossibility (though the law would not so regard it) that he should ever recover; even if he were *in articulo mortis*, and the bill was filed at that instant; still, the plaintiff could not qualify himself to maintain it, as having any interest in the subject of the suit."[5] If, moreover, the interest be such a one as may be immediately barred by the party against whom the bill is brought, it has been said that the court will withhold its assistance, for it would be a fruitless exercise of power.[6] Such a bill must also show that the defendant has, or claims to have, a title or interest in opposition to that of the plaintiff in the subject-matter of the proposed testimony,[7] as, for example, that the defendant claims an exclusive right to the use of a process which the plaintiff is using, and rests his claim upon letters-patent which the proposed testimony will show to be invalid;[8] and some ground of necessity for perpetuating the evidence, as that the facts to which the testimony of the witnesses proposed to be examined relate, cannot be immediately investigated in a court of law or equity,— or, if they can be immediately investigated, that the right to commence such a suit or action belongs exclusively to the defendant; or that the defendant has interposed some impediment, such as an injunction, to an immediate trial of the matter in a court of law; or that, before the investigation can take place, the evidence of a material witness is likely to be lost by his threatened death, illness, or departure from the jurisdiction of the court;[9] but the fact that, in the case recently cited, the Attorney-General might institute a proceeding to annul a patent, did not prevent the granting of the prayer of the bill.[10] The prayer should be for leave to exam-

[5] Dursley v. Fitzhardinge, 6 Ves. 260.

[6] Dursley v. Fitzhardinge, 6 Ves. 261–263.

[7] Story's Eq. Pl., § 302.

[8] N. Y. & B. C. P. Co. v. N. Y. C. P. Co., 9 Fed. R. 578.

[9] Angell v. Angell, 1 Sim. & S. 83; N. Y. & B. C. P. Co. v. N. Y. C. P. Co., 9 Fed. R. 578; Story's Eq. Pl., § 303; Daniell's Ch. Pr. 1572, 1573.

[10] N. Y. & B. C. P. Co. v. N. Y. C. P. Co., 9 Fed. R. 578.

ine the witnesses touching the matter stated, to the end that their testimony may be preserved and perpetuated, and for the proper process of subpœna.[11] It has been held that if it adds thereto a prayer for other, or for general relief, it will be demurrable for that reason,[12] although the court may allow an amendment omitting that part of the prayer.[13] An affidavit of the circumstances by which the evidence intended to be perpetuated is in danger of being lost, must be filed with the bill.[14] Otherwise, the bill should conform substantially to the requirements of original bills praying relief. Such a bill, it has been held, cannot by amendment be converted into a bill of discovery.[15] It is of itself a bill of discovery only to the extent of enabling the plaintiff to obtain the relief prayed for in it, and he can, therefore, only require an answer from the defendant as to the facts alleged in the bill as entitling him to examine the witnesses.[16] An omission of any of the foregoing statements in, or requirements of, the bill will make it demurrable; and if any of the necessary allegations are false, or there is another objection not apparent upon the face of the bill, that may be taken by plea or answer.[17] If the defendant answer denying the plaintiff's case, witnesses may be examined as to the point in issue by either party.[18] Otherwise, such a bill should not be brought to a hearing, and if the plaintiff do so it will be dismissed with costs, but without prejudice to the use of the testimony taken in pursuance of its prayer.[19] It is said that "If the plaintiff neglects to proceed with the suit, the defendant cannot move to dismiss for want of prosecution; but may move that the plaintiff be ordered to take the next step, within a limited time, or to pay him the costs of the suit. If

[11] Story's Eq. Pl., § 306.

[12] Rose v. Gannel, 3 Atk. 439; Vaughan v. Fitzgerald, 1 Sch. & Lef. 316; Ætna Life Ins. Co. v. Smith, 73 Fed. R. 318; Dalton v. Thompson, 1 Dickens, 97. But see Equity Rule 21; Cleland v. Casgrain, 92 Mich. 139; s. c., 52 N. W. R. 460.

[13] Vaughan v. Fitzgerald, 1 S. & L. 316.

[14] Earl of Suffolk v. Green, 1 Atk. 450; Philips v. Carew, 1 P. Wms. 117; Shirley v. Earl Ferrers, 3 P. Wms. 77.

[15] Ellice v. Roupell, 32 Beav. 299; s. c., 9 Jur. (N. S.) 530.

[16] Ellice v. Roupell, 32 Beav. 308; s. c., 9 Jur. (N. S.) 533.

[17] Story's Eq. Pl., § 306*a*.

[18] Brigstocke v. Roch, 7 Jur. (N. S.) 63.

[19] Hall v. Hoddesdon, 2 P. Wms. 162; Anon., Amb. 237; s. c., 2 Ves. Sen. 497; Vaughan v. Fitzgerald, 1 Sch. & Lef. 316; Morrison v. Arnold, 19 Ves. 670; Ellice v. Roupell, 32 Beav. 308.

the defendant neglects to take the steps proper to be taken by him within the prescribed time, the court will, it seems, order the examination of the witnesses to proceed."[20] If no valid objection is made, the court will order the testimony to be taken. Both parties may examine witnesses under the order,[21] and either party must be allowed to cross-examine those whom his opponent examines in chief.[22] After the witnesses have been examined, the cause is at an end,[23] and if the defendant have examined no witnesses in chief he will be entitled to his costs; but by receiving costs he waives any objection he might otherwise be entitled to make on the ground that he has had no sufficient opportunity of cross-examination.[24] The testimony thus taken is filed in the clerk's office, and can be used in a subsequent case at law or in equity in the same court, under an order, which must be obtained by motion upon notice, and supported by proof of the witness's death, or that he cannot be then compelled to attend and testify.[25]

§ 280. Bills to take testimony de bene esse.— Bills to take testimony *de bene esse* were formerly filed after a suit or action had been begun, in order to take the testimony of such witnesses as, on account of their age, infirmity, or intention to depart from the jurisdiction of the court, it was feared could not be taken in its regular method of proceeding.[1] Such bills must substantially comply with the rules regulating bills to perpetuate testimony, with which, indeed, they have been often confounded.[2] Now that the same relief can be afforded under the statutes both of most of the individual States and of the United States,[3] it is rarely, if ever, that an occasion for their use arises.

§ 281. Bills of discovery.— Every bill may seek discovery, but the kind of bill called a bill of discovery is a bill filed for

[20] Daniell's Ch. Pr. (5th Am. ed.) 1573; Wright v. Tatham, 2 Sim. 459; Beavan v. Carpenter, 11 Sim. 23; Coveny v. Athill, 1 Dick. 355; Lancaster v. Lancaster, 6 Sim. 439.

[21] Sheward v. Sheward, 2 V. & B. 116; Earl of Abergavenny v. Powell, 1 Meriv. 434; Skrine v. Powell, 15 Sim. 81; s. c., 9 Jur. 1054.

[22] Daniell's Ch. Pr. (5th Am. ed.) 1573, 1574.

[23] Morrison v. Arnold, 19 Ves. 670; Vaughan v. Fitzgerald, 1 Sch. & Lef. 316.

[24] Watkins v. Atchison, 10 Hare, Ap. xlvi.

[25] Daniell's Ch. Pr. (5th Am. ed.) 1574, 1575.

§ 280. [1] Story's Eq. Pl., § 307.

[2] Story's Eq. Pl., § 307.

[3] U. S. R. S., §§ 863-865; Equity Rule 70; *supra*, §§ 109, 134.

the sole purpose of obtaining a discovery of facts resting in the defendant's knowledge, or of deeds, writings, or other things in his custody or power; and seeking no relief in consequence of the discovery, except possibly a stay of proceedings till the discovery is made.[1] A bill of discovery is usually filed in aid of the jurisdiction of another court.[2] It will not be allowed, if it seek a discovery of matters concerning which a party, if called as a witness, would be excused from testifying;[3] nor, it has been said, if the discovery is sought in aid of an action for a mere personal tort.[4] A bill of discovery can only be filed in aid of a judicial proceeding already commenced or immediately contemplated.[5] If filed in aid of proceedings already begun, no person may be made a party to it who is not a party to such proceedings,[6] except possibly the officer of a corporation.[7] A bill of discovery must state the matter touching which discovery is sought, show that both the plaintiff and the defendant have or claim an interest therein, state the facts and circumstances upon which the plaintiff's right to compel discovery from the defendant is founded, and pray that the defendant may make a full discovery of the matters therein stated.[8] A bill of discovery may also pray any equitable assistance of the court which is merely consequential upon the prayer for discovery;[9] but if it should pray any other or general relief, it will thereby become a bill for relief.[10] It seems that a bill of discovery need not allege that the facts of which a discovery is sought are within the exclusive knowledge of the defendant;[11] but they must be matters essential to a plaintiff's cause of action, or if he be defendant in another suit or action, to his

§ 281. [1] Daniell's Ch. Pr. (5th Am. ed.) 1556.

[2] Daniell's Ch. Pr. (5th Am. ed.) 1556.

[3] Glynn v. Houston, 1 Keen, 329; Langdell's Eq. Pl., § 69; Wigram on Discovery, §§ 130–138; Daniell's Ch. Pr. (2d Am. ed.) 563–569.

[4] Glynn v. Houston, 1 Keen, 329. For discovery of an unlawful combination, see Evans v. Lancaster City St. Ry. Co., 64 Fed. R. 626.

[5] Mayor of London v. Levy, 8 Ves. 398; United N. J. R. & C. Co. v. Hoppock, 1 Stew. Eq. (N. J.) 261; Daniell's Ch. Pr. 1558.

[6] Queen of Portugal v. Glyn, 7 Cl. & F. 466; Daniell's Ch. Pr. (5th Am. ed.) 1558.

[7] See § 48.

[8] Daniell's Ch. Pr. (5th Am. ed.) 1557.

[9] Mitford's Eq. Pl., ch. i, § 2; Loker v. Roll, 3 Ves. 4.

[10] Angell v. Westcombe, 6 Sim. 30.

[11] Metler v. Metler, 4 C. E. Green (19 N. J. Eq.), 457. But see Bell v. Pomeroy, 41 McLean, 57.

affirmative defense, and the bill must not seek discovery of the evidence of a part of what belongs solely to the defendant's case.[12] The defendant may oppose a bill of discovery by a demurrer,[13] or plea, or in his answer, in the same manner as he might oppose a bill for relief. The English rule, as finally established, was that, if a demurrer were interposed to a bill praying both discovery and relief, and the bill were held not to show a proper case for relief, it could not be maintained for discovery merely.[14] The rule in the Federal courts is uncertain.[15] A defense founded upon the statute of limitations or laches may be interposed to a bill of discovery by plea,[16] or, if it appear upon the face of the bill, by demurrer.[17] A material amendment of a bill of discovery will very rarely be allowed.[18] A bill of discovery is never brought to a hearing; but, after the defendant has put in a full answer thereto, he is entitled to costs of the suit,[19] less any costs allowed the plaintiff upon exceptions to a previous answer as insufficient.[20] It has been held in the district of Wisconsin that a bill of discovery cannot be maintained in a Circuit Court of the United States held within a State under whose statutes a party can be compelled to testify,[21] but the preponderance of authority is otherwise.[22]

[12] Wigram on Discovery, § 372; Langdell's Eq. Pl., § 172; Ingilby v. Shafto, 33 Beav. 31.

[13] Evans v. Lancaster City St. Ry. Co., 64 Fed. R. 626.

[14] Fry v. Penn, 2 Bro. C. C. 280; Loker v. Rolle, 3 Ves. 4; Langdell's Eq. Pl., § 152.

[15] It seems that the rule is the same as in England. Markey v. Mut. Ben., L. Ins. Co., 6 Ins. L. J. 537; Cecil Nat. Bank v. Thurber (C. C. A.), 59 Fed. R. 913. But see Livingston v. Story, 9 Pet. 632; Wright v. Dame, 1 Met. (Mass.) 237; Higginbotham v. Burnet, 5 J. Ch. (N. Y.) 184; Story's Eq. Pl., § 412.

[16] Beames on Pleas, 275; Gait v. Osbaldeston, 1 Russ. 158.

[17] Wooster v. Sidenbergh, S. D. N. Y., Nov. 6, 1889.

[18] Marquis Cholmondeley v. Lord Clinton, 2 Meriv. 71.

[19] Atty. Gen. v. Burch, 4 Madd. 178.

[20] Hughes v. Clerk, 6 Hare, 195. See also Bryant v. Leland, 6 Fed. R. 125, U. S. C. C., D. Mass.; Easton v. Hodges, 7 Bissell, 324, U. S. C. C., D. Illinois; Paton v. Majors, 46 Fed. R. 210, U. S. C. C., E. D. La., Billings, J.; Washburn & M. Mfg. Co. v. Freeman Wire Co., 41 Fed. R. 410, U. S. C. C., E. D. Mo., Thayer, J.; Washburn & M. Mfg. Co. v. Cincinnati B. W. F. Co., 42 Fed. R. 675, U. S. C. C., S. D. Ohio.

[21] Rindskopf v. Plato, 20 Fed. R. 130. So in the district of Louisiana. Paton v. Majors, 46 Fed. R. 210. See also Heath v. Erie R. Co., 9 Blatchf. 316; Brown v. Swann, 10 Pet. 497; Manchester F. A. Co. v. Stockton, C. H. & A. Works, 38 Fed. R. 878.

[22] Continental Nat. Bank v. Heilman, 66 Fed. R. 184; Kelly v. Boettcher, 85 Fed. R. 55, 66; National H.

§ 282. Testimony taken before a cause is at issue.— Testimony for use in a court of law or equity of the United States may be taken either before or after it is at issue. Testimony taken before a cause is at issue may be taken either before or after it has been begun. "Any court of the United States may, in its discretion, admit in evidence in any cause before it any deposition taken in *perpetuam rei memoriam*, which would be so admissible in a court of the State wherein such cause is pending, according to the laws thereof."[1] Evidence taken by means of a bill to perpetuate testimony may also be admitted in a subsequent suit in equity.[2] "After any bill filed and before the defendant hath answered the same, upon affidavit made, that any of the plaintiff's witnesses are aged and infirm, or going out of the country, or that any one of them is a single witness to a material fact, the clerk of the court shall, as of course, upon the application of the plaintiff, issue a commission to such commissioner or commissioners as a judge of the court may direct, to take the examination of such witness or witnesses *de bene esse*, upon giving due notice to the adverse party of the time and place of taking his testimony."[3] Such testimony is then taken in the same manner as testimony taken after issue has been joined.

§ 283. The time for taking testimony in equity.— The Equity Rules provide: "Three months, and no more, shall be allowed for the taking of testimony after the cause is at issue, unless the court, or a judge thereof, shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing."[1] "Where the evidence to be adduced in a

B. B. Co. v. Interchangeable B. B. Co. (C. C. A.), 83 Fed. R. 26, 30; Bryant v. Leyland, 6 Fed. R. 125; Indianapolis Gas Co. v. Indianapolis, 90 Fed. R. 196; Colgate v. Compagnie Francaise, 23 Fed. R. 82. See also Paine v. Warren, 33 Fed. R. 857.

§ 282. [1] U. S. R. S., § 867.

[2] N. Y. & B. C. P. Co. v. N. Y. C. P. Co., 0 Fed. R. 578.

[3] Equity Rule 70. See Eslava v. Mazange, 1 Woods, 623. It has been held that under U. S. R. S., §§ 858, 863, the defendant may examine plaintiff *de bene esse* before issue joined, where the latter resides out of the district, and more than one hundred miles from the place of trial. Lowrey v. Kusworm (C. C. A.), 66 Fed. R. 9; *infra*, § 256. See also 27 St. at L. 17; *infra*, § 284, notes 10, 11.

§ 283. [1] Equity Rule 67. This rule does not apply to a reference of an interlocutory matter to a master. Coosaw Min. Co. v. Farmers' Min. Co., 67 Fed. R. 31. Except in a very un-

cause is to be taken orally, as provided in the order passed at the December term, 1861, amending the 67th General Rule, the court may, on motion of either party, assign a time within which the complainant shall take his evidence in support of the bill, and a time thereafter within which the defendant shall take his evidence in defense, and a time thereafter within which the complainant shall take his evidence in reply; and no further evidence shall be taken in the cause, unless by agreement of the parties, or by leave of the court first obtained, on motion, for cause shown."[2] Upon due notice, given as prescribed by previous order, the court may, at its discretion, permit the whole or any specific part of the evidence to be adduced orally in open court on final hearing."[3] Testimony taken after the time has expired may by leave of the court be filed *nunc pro tunc*.[4]

§ 284. Testimony taken within the jurisdiction of the court after a cause is at issue.— Testimony taken after a cause is at issue is taken differently when taken within than when taken without the jurisdiction of the court. Originally, the only manner of examining witnesses within the jurisdiction of a court of chancery was by means of written interrogatories and cross-interrogatories, which were prepared by the solicitors and counsel of the respective parties, or by the court, and then submitted to an examiner or one or more commissioners appointed by the court, who examined the witnesses privately by means of them. The testimony thus obtained was kept secret until all the testimony in the cause had been taken. The time when it could first be inspected was called the time of publication.[1] This method of taking testimony was, like many other

usual case the appellate court will not review the action of the lower court in giving or refusing time in which to take testimony. Ingle v. Jones, 9 Wall. 486; Grant v. Phœnix M. L. Ins. Co., 121 U. S. 105. See Streat v. Steinam, 38 Fed. R. 548; Wooster v. Clark, 9 Fed. R. 854.

[2] Amendment of 1869 to Rule 67. See Rule 108, U. S. C. C., S. D. N. Y; *infra*, § 284, note 4.

[3] Amendment of May 15, 1893, to Equity Rule 67, 149 U. S. 793. The order should be obtained on notice and the testimony taken down in writing. Mears v. Lockhart (C. C. A.), 94 Fed. R. 274.

[4] Fischer v. Hayes, 6 Fed. R. 76; s. c., 19 Blatchf. 25; Coon v. Abbot, 37 Fed. R. 98; Wenham v. Switzer, 48 Fed. R. 612; Emerson Co. v. Nimorus, 88 Fed. R. 280.

§ 284. [1] Langdell's Eq. Pl., §§ 56–58. See Eillert v. Craps, 44 Fed. R. 792; Wood v. Mann, 2 Sumn. 316. The Federal Equity Rules upon the sub-

parts of equity practice, borrowed from the canon law; with this difference, however, that whereas by the canon law each party before the examination of witnesses was obliged to furnish his adversary and the court with articles containing a spe-

ject are as follows: "After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same in the clerk's office, ten days' notice thereof being given to the adverse party to file cross-interrogatories before the issuing of the commission; and if no cross-interrogatories are filed at the expiration of the time, the commission may issue *ex parte*. In all cases, the commissioner or commissioners shall be named by the court, or by a judge thereof. If the parties shall so agree, the testimony may be taken upon oral interrogatories by the parties or their agents, without filing any written interrogatories." Equity Rule 67. In 1861 the last paragraph of this rule was repealed. In 1854 it was "ordered, that the sixty-seventh rule governing equity practice be so amended as to allow the presiding judge of any court exercising jurisdiction, either in term time or in vacation, to vest in the clerk of said court general power to name commissioners to take testimony in like manner that the court or judge thereof can now do by the said sixty-seventh rule." "Immediately upon the return of the commissions and depositions containing the testimony into the clerk's office, publication thereof may be ordered in the clerk's office, by any judge of the court, upon due notice to the parties, or it may be enlarged as he may deem reasonable under the circumstances; but, by consent of the parties, publication of the testimony may at any time pass into the clerk's office, such consent being in writing, and a copy thereof entered in the order books, or indorsed upon the deposition or testimony." Equity Rule 69; Eillert v. Craps, 44 Fed. R. 792. Where there is a dispute as to the relevancy of an interrogatory or cross-interrogatory, the usual practice is to allow it to be answered in a doubtful case, and to determine the objections to it at the hearing, or by a motion to suppress the deposition. Zunkel v. Litchfield, 21 Fed. R. 196, 197; Giles v. Paxson, 36 Fed. R. 882; Appleton v. Ecaubert, 45 Fed. R. 281; Edison El. L. Co. v. U. S. El. L. Co., 44 Fed. R. 294; s. c., 45 Fed. R. 55; Blease v. Garlington, 92 U. S. 1. The court may refer the interrogatories to a master to inquire into their relevancy. Zunkel v. Litchfield, 21 Fed. R. 196. It has been said that, as a general rule, after the publication of testimony, no more can be taken unless the judge himself, upon or after the hearing, entertains a doubt, or the proof of some additional fact is indispensable to enable him to make a satisfactory decree; but that exhibits in a cause may be proved after publication, and even *viva voce* at the hearing, when they have not been proved in due season; and that a witness may be examined after publication as to the credit of other witnesses; and that the time may be enlarged after publication is passed, but not in fact made according to rules of court, upon good cause, as surprise, accident, or some other circumstances repelling imputations of laches, proved by affidavit, which, unless the other party has practiced fraud, is indispensable. Wood v. Mann, 2 Sumn. 316. See Eillert v. Craps, 44 Fed. R. 792.

cific statement of the facts which he expected to prove by them; in equity, on the other hand, except in a few rare instances, facts, not evidence, are required to be pleaded. So, originally, each party was before publication very much in the dark as to the facts which his antagonist intended to attempt to establish. "It is not surprising, therefore, that the mode of taking testimony in equity fell into disrepute, and finally broke down."[2] Testimony in equity is now, therefore, almost universally allowed to be taken orally in the presence of counsel. The rules regulating the practice of the courts of the United States upon the subject are as follows: "Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined shall be examined before one of the examiners of the court, or before an examiner to be specially appointed by the court, the examiner to be furnished with a copy of the bill and answer, if any; and such examination shall take place in the presence of the parties or their agents, by their counsel or solicitors, and the witnesses shall be subject to cross-examination and re-examination, and which shall be conducted as near as may be in the mode now used in the common-law courts. The depositions taken upon such oral examinations shall be taken down in writing by the examiner in the form of a narrative unless he determines the examination shall be by question and answer in special instances; in which instances it shall be taken down by a stenographer and be put into typewriting or other writing, and, when completed, shall be read over to the witness and signed by him in the presence of the parties or counsel, or such of them as may attend; provided, if the witness shall refuse to sign the said deposition, then the examiner shall sign the same; and the examiner may, upon all examinations, state any special matter to the court as he shall see fit; and any question or questions which may be objected to shall be noted by the examiner upon the deposition, but he shall not have power to decide on the competency, materiality, or relevancy of the questions; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just." "The expense of the taking down of depositions by a stenographer and of putting

[2] Langdell's Eq. Pl., § 56. See also Langdell's Eq. Pl., §§ 14-19.

them into typewriting or other writing, shall be paid in the first instance by the party who makes the examination or the cross-examination, as the case may be, and shall be imposed by the court, as part of the costs, upon such party as the court shall adjudge shall ultimately bear them."

"In case of refusal of witnesses to attend, to be sworn, or to answer any question put by the examiner, or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories. Notice shall be given by the respective counsel or solicitors, to the opposite counsel or solicitors, or parties, of the time and place of the examination, for such reasonable time as the examiner may fix by order in each cause. When the examination of witnesses before the examiner is concluded, the original deposition, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the court, to be there filed of record, in the same mode as prescribed in the thirtieth section of Act of Congress, September 24, 1789.[3] Testimony may be taken on commission in the usual way, by written interrogatories and cross-interrogatories, or motion to the court in term time, or to a judge in vacation, for special reasons satisfactory to the court or judge."[4] The examiner must note all objec-

[3] U. S. R. S., § 865. See *infra*, §§ 286, 287.

[4] Amendment of 1861 to Rule 67. In the Circuit Court of the United States for the Southern District of New York, the following rules regulate the subject: "If a general commission is not issued, pursuant to the 25th Rule of the Supreme Court, within ten days after replication filed, either party may give notice of the examination of witnesses before the standing examiner of this Court; and three months from the time of the replication shall be allowed the parties for taking their depositions before the examiner." (Rule 108.) "In taking testimony, all Masters, Examiners, Referees, and Commissioners shall, where testimony is written down by question and answer, number the questions put to each witness continuously, from the commencement of his direct examination to the final close of his examination, direct and cross." (Rule of November 10, 1868.) "Whenever it is intended to offer oral proof in open court, the party proposing it shall give due notice to the opposite party of the names of the witnesses, the matters to which they are to be examined, and of the reasons upon which he will move for an examination." (Rule 110.) "A master or examiner, in taking proofs, or in matters of reference, shall not, without the written consent of all parties, or the authorization of one of the judges, adjourn proceedings pending before him, for a longer time than ten days." (Rule 115.) "No rule or

tions and exceptions to questions and answers, and take the testimony subject to them, but cannot decide on their validity.[5] It has been held that the court will not interfere to prevent irrelevant questions.[6] Irrelevant evidence may be stricken out, and the costs of taking the same imposed upon the party who took it.[7] Upon due notice given as prescribed by previous order, the court may, in its discretion, permit the whole or any specific part of the evidence to be adduced orally in open court on final hearing.[8] The act of March 9, 1892, provides that in

order need be entered for the publication of testimony; but so soon as the commissioner or examiner shall have completed the testimony offered, the party taking it shall cause the deposition to be filed in the clerk's office, and forthwith give notice thereof to the adverse party. Either party may thereupon enter a rule of course, that the clerk open the commission, or deposition, and file the same." (Rule 112.) "Within four days after the clerk shall have prepared copies of the depositions (provided the same were applied for in two days after the notice of the filing thereof), the adverse party may give notice of exception, before a judge at chambers, to the proofs or any part of them, on account of any irregularity in taking the depositions, or executing the commissions; and, if no such notice of exception is given, all objections to the form or manner in which the proofs were taken shall be deemed waived." (Rule 113.) "Whenever it is intended to offer oral proof in open court, the party proposing it shall give due notice to the opposite party of the names of the witnesses, the matters to which they are to be examined, and of the reasons upon which he will move for an examination." (Rule 110.)

[5] Appleton v. Ecaubert, 45 Fed. R. 281. The action of an examiner in adjourning the hearing after a witness is tendered for cross-examination is final, and if the party who offered the witness refuses to produce him for cross-examination his testimony in chief will be suppressed. Shapleigh v. Chester El. L. & P. Co., 47 Fed. R. 848. The court may, after a deposition has been concluded, allow further cross-examination. La Normandie (C. C. A.), 58 Fed. R. 427; s. c., 40 Fed. R. 590. For a case where a deposition was admitted when the witness had died before his cross-examination, which had been adjourned at the request of the cross-examiner, see Celluloid Mfg. Co. v. Arlington Mfg. Co., 47 Fed. R. 4. For a case where a deposition was taken by consent in the absence of the examiner, and a dispute arose, see Ballard v. McCluskey, 52 Fed. R. 677. It has been held that when the parties stipulate that testimony may be taken before any officer or magistrate qualified to administer oaths without special appointment by the court as an examiner, the deposition thus taken must be filed on record, as required by Equity Rule 67, in cases where an examiner is regularly appointed; and the party in whose behalf the testimony was taken has no right to suppress it. T. L. Mott Iron Works v. Standard Mfg. Co. (C. C.), 48 Fed. R. 845.

[6] Blease v. Garlington, 92 U. S. 1, 4–8; Lloyd v. Pennie, 50 Fed. R. 4, 11; *supra*, § 267.

[7] Griffith v. Shaw, 89 Fed. R. 313.

[8] Amendment of May 15, 1893, to

addition to the mode of taking the depositions of witnesses in cases pending at law or equity in the District and Circuit Courts of the United States, it shall be lawful to take the depositions of witnesses in the mode prescribed by the laws of the State in which the courts are held.[9] It has been said that this merely provides an additional method of taking testimony, and does not confer any additional rights, such as an examination of a party to an action at law before trial,[10] or before issue joined.[11]

§ 285. Testimony taken after a cause is at issue and beyond the jurisdiction of the court.— It often happens that a witness, whose testimony is needed by either party to a suit in equity, is beyond the jurisdiction of the court. In such a case, his testimony can be taken in six ways,— by deposition, according to the acts of Congress;[1] by a commission under a *dedimus potestatem;*[2] and by letters rogatory,[3] in the method prescribed by the laws of the State where the court is held;[4] and by a special master or examiner,[5] or master[6] appointed by the court where the suit is pending to take testimony in another district, or even in a foreign country.[7]

§ 286. Depositions de bene esse under the acts of Congress. The equity rules say that "testimony may also be taken in the cause, after it is at issue, by deposition, according to the acts of Congress. But in such case, if no notice is given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a

Equity Rule 67, 149 U. S. 793; Mears v. Lockhart (C. C. A.), 94 Fed. R. 274; Blease v. Garlington, 92 U. S. 1, 8. For the practice when testimony is taken in a foreign language, see Euberweg v. La Compagnie Generale Transatlantique, 35 Fed. R. 530; The Jacob Brandon, 33 Fed. R. 160.

[9] 27 St. at L. 17.

[10] Nat. Cash Reg. Co. v. Leland (C. C. A.), 94 Fed. R. 502; s. c., 77 Fed. R. 242.

[11] Shellebarger v. Oliver, 64 Fed. R. 806; Texas & Pac. Ry. Co. v. Wilder (C. C. A.), 92 Fed. R. 953; Despeaux v. Pennsylvania R. Co., 81 Fed. R. 897.

§ 285. [1] *Infra*, §§ 286, 287.

[2] *Infra*, §§ 288, 289.

[3] *Infra*, § 290.

[4] 27 St. at L. 17; *supra*, § 284, notes 10, 11.

[5] White v. Toledo R. Co. (C. C. A.), 79 Fed. R. 133; North Carolina R. Co. v. Drew, 3 Woods, 691; In re Steward, 29 Fed. R. 813; Johnson Steel Street Rail Co. v. North Branch Steel Co., 48 Fed. R. 191; In re Allis, 44 Fed. R. 217; In re Spofford, 62 Fed. R. 443. But see Arnold v. Chesebrough, 35 Fed. R. 16, and Celluloid Mfg. Co. v. Russell, 35 Fed. R. 17.

[6] Consolidated Fastener Co. v. Columbian B. & T. Co., 85 Fed. R. 54.

[7] Bate Refrigerating Co. v. Gillette, 28 Fed. R. 673.

cross-examination of the witness either under a commission or by a new deposition taken under the act of Congress, if a court or judge thereof shall, under all the circumstances, deem it reasonable."[1] The acts of Congress on the subject apply to cases at common law and in equity.[2] They are as follows: "The testimony of any witness may be taken in any civil cause depending in a District or Circuit Court by deposition *de bene esse*, when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient and infirm. The deposition may be taken before any judge of any court of the United States, or any commissioner of a Circuit Court, or any clerk of a District or Circuit Court, or any chancellor, justice, or judge of a Supreme or Superior Court, mayor or chief magistrate of a city, judge of a County Court or Court of Common Pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the cause. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition, to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness, and the time and place of the taking of his deposition; and in all cases *in rem*, the person having the agency or possession of the property at the time of seizure shall be deemed the adverse party, until a claim shall have been put in; and whenever, by reason of the absence from the district and want of an attorney of record or other reason, the giving of the notice therein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice as any judge authorized to hold courts in such circuit or district shall think reasonable and direct. Any person may be compelled to appear and depose as provided by this section, in the same manner as witnesses may be compelled to appear and testify in court."[3] "Every person

§ 286. [1] Equity Rule 68. See Stegner v. Blake, 86 Fed. R. 183.

[2] Stegner v. Blake, 86 Fed. R. 183; U. S. R. S., § 863.

[3] U. S. R. S., § 863. It has been held that the deposition may be taken before a judge of probate if his court is a court of record, Merrill v. Daw-

deposing as provided in the preceding section, shall be cautioned and sworn to tell the whole truth, and carefully examined. His testimony shall be reduced to writing, or typewriting, by the officer taking the deposition, or by some other person under his personal supervision, or by the deponent himself in the officer's presence, and by no other person, and shall, after it has been reduced to writing or typewriting, be subscribed by the deponent."[4]

"Every deposition taken under the two preceding sections shall be retained by the magistrate taking it, until he delivers it with his own hand into the court for which it was taken; or it shall, together with a certificate of the reasons as aforesaid of taking it, and of the notice, if any, given to the adverse party, be by him sealed up and directed to such court, and remain under his seal until opened in court. But unless it appears to the satisfaction of the court that the witness is then dead, or gone out of the United States, or to a greater distance than one hundred miles from the place where the court is sitting, or that by reason of age, sickness, bodily infirmity, or imprisonment, he is unable to travel and appear at court, such deposition shall not be used in the cause."[5]

These sections do not apply to the taking of depositions in foreign countries.[6] A deposition cannot be taken under these statutory provisions after an appeal to the Supreme Court or the Circuit Court of Appeals has been perfected; for the case is then no longer "depending" in a Circuit Court.[7] This practice has no application to cases pending in the Supreme Court.[8] It has been held that an adverse party may be examined under this statute *de bene esse* before issue joined, when he resides

son, Hempst. 563; s. c. *sub nom.* Fowler v. Merrill, 11 How. 375; or any county judge, Voce v. Lawrence, 4 McLean, 203. It has been held that the deposition cannot be taken before a township justice, Schutte v. Thompson, 15 Wall. 152; or a judge of a county commissioner's court, Garey v. Union Bank, 3 Cranch, C. C. 91; or a judge of a city court, Freeman v. Holmead, 5 Cranch, C. C. 162.

[4] U. S. R. S., § 864, as amended May 13, 1900.

[5] U. S. R. S., § 865.

[6] Cortes Co. v. Tannhauser, 18 Fed. R. 667; Stein v. Bowman, 13 Pet. 209; The Alexandra, 104 Fed. R. 904. But see Bischoffsheim v. Baltzer, 10 Fed. R. 1.

[7] Richter v. Jerome, 25 Fed. R. 679, 681; Slaughter-House Cases, 10 Wall. 273.

[8] The Argo, 2 Wheat. 287; Richter v. Jerome, 25 Fed. R. 679, 681.

more than one hundred miles from the place of trial.[9] The magistrate should write down and return to the court any species of evidence offered before him, and cannot exclude evidence on the ground that it is not pertinent. It belongs to the court, on the return of the deposition, to determine whether the evidence is pertinent or not.[10] The relevancy of a question and the right to have the deposition taken will be tested, if the witness refuses to answer, and an application is made to punish him for contempt.[11] These statutory provisions, being in derogation of the common law, are strictly construed.[12] Consequently, before depositions thus taken can be read in evidence, the party that offers them must prove that compliance was made with all the requirements of the statutes, or else that these requirements were waived by the opposite party.[13] There is no presumption that a deposition was properly taken.[14] The certificate of the magistrate is *prima facie* evidence of such a compliance.[15] His certificate that the witness lives more than one hundred miles from the place of trial is *prima facie* evidence of that fact.[16] When the distance is great the court may take judicial notice of the fact.[17] A witness lives, within the meaning of the statute, at a place "where he can be found and is sojourning, residing or abiding for any lawful purpose."[18] It has been held that he lives at a place where he has gone for his health to remain for an uncertain time.[19] If the witness does not live more than one hundred miles from the place of trial, the party who has taken his depo-

[9] Lowrey v. Kusworm, 66 Fed. R. 539; *supra*, § 283. *Contra*, Stevens v. Mo., K. & T. Ry. Co., 104 Fed. R. 934.

[10] Ex parte Judson, 3 Blatchf. 89; Adee v. J. L. Mott Iron Works, 46 Fed. R. 89. See Thomson-Houston El. Co. v. Jeffrey Mfg. Co., 83 Fed. R. 614.

[11] Ex parte Peck, 3 Blatchf. 118; Ex parte Judson, 3 Blatchf. 89. See *supra*, § 284. note 17.

[12] Bell v. Morrison, 1 Pet. 351.

[13] Bell v. Morrison, 1 Pet. 351; Harris v. Wall, 7 How. 693.

[14] Bell v. Morrison, 1 Pet. 351; Banks v. Miller, 1 Cranch, C. C. 543.

[15] Harris v. Wall, 7 How. 693; Thorpe v. Simmons, 2 Cranch, C. C. 195.

[16] Patapsco Ins. Co. v. Southgate, 5 Pet. 604; Merrill v. Dawson, Hempst. 563; s. c. *sub nom.* Fowler v. Merrill, 11 How. 375; Tooker v. Thompson, 3 McLean, 92.

[17] Mutual Ben. Life Ins. Co. v. Robison, 58 Fed. R. 723.

[18] Ibid.

[19] Ibid. The fact that a witness is a seaman on a gunboat stationed in a harbor, but liable to be ordered to some other place, is, it seems, not sufficient to authorize the taking of his testimony *de bene esse* in this manner. The Samuel, 1 Wheat. 9.

sition must prove that his disability to attend still continues, and that due diligence was used in seeking to procure his attendance, before the deposition can be read in evidence.[20] The previous issue of a subpœna is not essential if proof of the inability of the witness is otherwise given.[21] If it appears that at the time when the deposition was taken the witness lived more than one hundred miles from the place of trial, the opposite party, upon whom the burden then rests, may prove that at the time of trial he lives within one hundred miles.[22] Whether a witness resides more than one hundred miles from the place of trial is to be determined by the actual distance by usual routes.[23] It has been held that parol evidence is inadmissible to show a sufficient reason, where the magistrate's certificate gives an insufficient reason.[24] No order or rule of the court is necessary in order to take depositions in this manner.[25] Although one deposition has been already taken, yet a second deposition of the same witness may be taken without an order of the court.[26] It is customary to file the notice or a copy thereof in the

[20] Patapsco Ins. Co. v. Southgate, 5 Pet. 604, 612; The Samuel, 1 Wheat. 9; Weed v. Kellogg, 6 McLean, 44; Jones v. Greenolds, 1 Cranch, C. C. 339; Penn v. Ingraham, 2 Wash. C. C. 487; Bannert v. Day, 3 Wash. C. C. 343; Pettibone v. Derringer, 4 Wash. C. C. 215; Read v. Bertrand, 4 Wash. C. C. 558; Brown v. Galloway, Pet. C. C. 291.

[21] Park v. Willis, 1 Cranch, C. C. 357; Leatherberry v. Radcliffe, 5 Cranch, C. C. 550.

[22] Penn v. Ingraham, 2 Wash. C. C. 487; Brown v. Galloway, Pet. C. C. 291; Pettibone v. Derringer, 4 Wash. 215; Russell v. Ashley, Hempst. 546, 549; Weed v. Kellogg, 6 McLean, 44; Whitford v. Clark Co., 119 U. S. 522; Patapsco Ins. Co. v. Southgate, 5 Pet. 604.

[23] Ex parte Beebee, 2 Wall. Jr. 127.

[24] Wheaton v. Love, 1 Cranch, C. C. 451. But see Dunkle v. Worcester, 5 Biss. 102. It is the proper practice for the magistrate to state in his certificate that he was not of counsel for either party nor interested in the event of the cause. Gartside Coal Co. v. Maxwell, 20 Fed. R. 187; Donohue v. Roberts, 19 Fed. R. 863. But see Miller v. Young. 2 Cranch, C. C. 53; Peyton v. Veitch, 2 Cranch, C. C. 123; Stewart v. Townsend, 41 Fed. R. 121. It has been held that the magistrate's certificate need not state the witness was "sworn to testify the whole truth," if it states that the witness was sworn. Bussard v. Catalino, 2 Cranch, C. C. 421. But see Rainer v. Haynes, Hempst. 689; Garrett v. Woodward, 2 Cranch, C. C. 190. Nor, perhaps, that the witness is not a resident of the district where the case is pending. Sage v. Tauszky, 6 Cent. L. J. 7.

[25] Pettibone v. Derringer, 4 Wash. 215; Buckingham v. Burgess, 3 McLean, 368. But see Walker v. Parker, 5 Cranch, C. C. 689.

[26] Nash, tenant of Connett, v. Williams, 20 Wall. 226. See U. S. v. Tilden, Fed. Cas. No. 16,522.

clerk's office, who may then issue a subpœna.[27] Any one, even a party to the suit, may serve the notice.[28] If the United States be a party, it seems that service should be made upon the nearest district attorney.[29] It has been held that if an attorney has been employed in a case and is still employed therein, notice should be given to him, although he has never formally appeared on the record.[30] The service must be personal, unless otherwise expressly authorized as provided for in the statute.[31] The notice must be served a reasonable time before the taking of the deposition.[32] The notice must show on its face that the contingency has happened which confers jurisdiction on the magistrate, and gives the party serving it a right to have the deposition taken; so that the party upon whom it is served may be able to judge whether it is necessary for him to attend.[33] It seems insufficient to swear the witness

[27] Davis v. Davis, 90 Fed. R. 791; Ex parte Judson, 3 Blatchf. 89.

[28] Young v. Davidson, 5 Cranch, C. C. 515.

[29] The Argo, 2 Gall. 314.

[30] Allen v. Blunt, 2 M. & W. 121.

[31] Carrington v. Stimson, 1 Curt. 437. *Contra*, Merrill v. Dawson, Hempst. 563; s. c. *sub nom.* Fowler v. Merrill, 11 How. 375.

[32] Jamieson v. Willis, 1 Cranch, C. C. 566; Renner v. Howland, 2 Cranch, C. C. 441; Barrell v. Simonton, 3 Cranch, C. C. 681; Am. Ex. Nat. Bank v. First Nat. Bank (C. C. A.), 83 Fed. R. 961. An hour's notice has been held to be reasonable. Leiper v. Bickley, 1 Cranch, C. C. 29; Bowie v. Talbot, 1 Cranch. C. C. 247; Atkinson v. Glenn, 4 Cranch, C. C. 134. But see Renner v. Howland, 2 Cranch, C. C. 441; Irving v. Sutton, 1 Cranch, C. C. 567. It seems that it is not proper to serve a notice for the taking of a deposition during a term at which the cause could be tried, Allen v. Blunt, 2 W. & M. 121; Bell v. Nimmon, 4 McLean, 539. *Contra*, Union Pac. Ry. Co. v. Reese (C. C. A.), 56 Fed. R. 288; or so short a time before as not to allow an attorney, if he attend, to reach the court before the commencement of that term. Bell v. Nimmon, 4 McLean, 539. Where the parties and their attorneys lived in the place where the deposition was taken, a notice that the deposition would be taken "before William G. Peckham, Esq., Notary Public, or some other officer authorized by law to take depositions," etc., was held sufficient when the deposition was taken before another notary. Gormley v. Bunyan, 138 U. S. 623, 632.

[33] Aldrich v. Nye, U. S. C. C., S. D. N. Y., Lacombe, J., Oct. 31, 1891; Harris v. Wall, 7 How. 693. *Contra*, Debutts v. McCulloch, 1 Cranch, C. C. 28; Sage v. Tauszky, 6 Cent. L. J. 7. If the witnesses' Christian names are unknown, the inclusion of their surnames in the notice will be sufficient. Claxton v. Adams, 1 MacAr. (D. C.) 496. See Carrington v. Stimson, 1 Curt. 437. If the notice state that the taking of depositions will be adjourned from day to day, it seems that depositions taken upon an adjourned day will be received. Knode v. Williamson, 17 Wall. 586; Sage v. Tauszky, 6 Cent. L. J. 7. But see Kirkpatrick v. B. & O. R. Co., 24 Pittsb. L. J. 51. A notice that a party

to tell the whole truth concerning such interrogatories as may be put to him. He should be sworn or should affirm to tell the whole truth as far as he knows concerning the matter in controversy between the parties.[34] It seems that if the witness is properly sworn, it is not necessary that he be also cautioned to testify the whole truth;[35] and that the oath may be administered after the deposition has been reduced to writing, as well as before.[36] If the witness has conscientious scruples about taking an oath, he may affirm.[37] The certificate of the magistrate that the witness has such conscientious scruples is sufficient evidence thereof.[38] It has been held that a witness may be compelled to attend for the purpose of having his deposition taken *de bene esse*, either by a subpœna, a subpœna *duces tecum*, or the writ of *habeas corpus ad testificandum*, but that a commissioner cannot issue a writ of *habeas corpus* to take a person from jail for the purpose of giving his deposition before such a commissioner.[39] A party cannot be compelled by a subpœna to produce papers, books, &c., which would not be material or competent as evidence, merely for the purpose of refreshing his memory,[40] but the production of papers which are material may be thus compelled,[41] not, however, it has been held, by the client from an attorney, who has a lien upon the same.[42] It has been held that after a party has examined a witness in chief under the statutory provisions and demanded an adjournment, he has no right to withdraw the proceedings,

will on the same day take depositions of witnesses in different cities is unreasonable, and such depositions will be suppressed; even, it has been held, if the opposite party appeared at each by counsel and cross-examined, provided that before the direct examination the objection was specifically stated, and although such party had served similar notices of the taking of depositions at other times and places on his own behalf. Uhle v. Burnham, 44 Fed. R. 729.

[34] Shutte v. Thompson, 15 Wall. 152; Pendleton v. Forbes, 1 Cranch, C. C. 507; Garrett v. Woodward, 2 Cranch, C. C. 190; Rainer v. Haynes, Hempst. 689; Wilson S. M. A. v. Jackson, 1 Hughes, 295; U. S. v. Smith, 4 Day, 121.

[35] Doe d. Moore v. Nelson, 3 McLean, 383; Brown v. Piatt, 2 Cranch, C. C. 253. *Contra*, Luther v. The Merritt Hunt, 1 Newb. Adm. 4.

[36] Tooker v. Thompson, 3 McLean, 92.

[37] U. S. R. S., § 1.

[38] Elliot v. Hayman, 2 Cranch, C. C. 678.

[39] Ex parte Peck, 3 Blatchf. 113; U. S. v. Tilden, 10 Ben. 566; *infra*, § 366.

[40] Ibid.

[41] Davis v. Davis, 90 Fed. R. 791.

[42] Ibid.

and that any party in interest may compel such witness to appear and submit to cross-examination.[43] Either party may obtain an order compelling the return of a deposition thus taken.[44] After the deposition is complete, the court may allow a further cross-examination on newly-discovered facts.[45] The court has the power to compel the opening of such a deposition before the trial upon the motion of either party against the objection of the other.[46] It is the safer practice to have the witness sign his deposition.[47] No notice of filing a deposition need be given to a party who knows it has been taken.[48] A State statute requiring depositions to be filed a certain number of days before trial was not followed by the Federal court.[49]

§ 287. Form of deposition under acts of Congress.— The deposition should state, either in its body or in its caption, the name of the court where the cause is pending,[1] the title of the cause,[2] and the place where the deposition is taken.[3] If the deponent reduces the deposition to writing, the magistrate must certify that it was reduced to writing by the deponent in his

[43] Ex parte Barnes, 1 Sprague, 133; Re Rindskopf, 24 Fed. R. 542.

[44] First Nat. Bank v. Forest, 44 Fed. R. 246.

[45] The Normandie, 40 Fed. R. 590.

[46] U. S. v. Tilden, 10 Ben. 170.

[47] Thorpe v. Simmons, 2 Cranch, C. C. 195.

[48] Nelson v. Woodruff, 1 Black, 156; Leatherberry v. Radcliffe, 5 Cranch, C. C. 550. For practice when a deposition is destroyed, see Stebbins v. Duncan, 108 U. S. 32.

[49] Walker v. Collins, 59 Fed. R. 70.

§ 287. [1] Van Ness v. Heineke, 2 Cranch, C. C. 259.

[2] Peyton v. Veitch, 2 Cranch, C. C. 123; Smith v. Coleman, 2 Cranch, C. C. 287; Centre v. Keene, 2 Cranch, C. C. 198; Waskern v. Diamond, Hempst. 701; Allen v. Blunt, 2 W. & M. 121. But see Voce v. Lawrence, 4 McLean, 203; Buckingham v. Burgess, 3 McLean, 368; Pannill v. Eliason, 3 Cranch, C. C. 358; Merrill v. Dawson, Hempst. 563; s. c. *sub nom.* Fowler v. Merrill, 11 How. 375.

[3] Pendleton v. Forbes, 1 Cranch, C. C. 507; Tooker v. Thompson, 3 McLean, 92. A slight error in the caption, such as a mistake in spelling the name of a party, Van Ness v. Heineke, 2 Cranch, C. C. 259; or the omission from the title of the cause of the name of one of several plaintiffs or defendants, is not a ground of suppressing the deposition. Pamill v. Eliason, 3 Cranch, C. C. 358; Egbert v. Citizens' Ins. Co., 7 Fed. R. 47; Merrill v. Dawson, Hempst. 563; s. c. *sub nom.* Fowler v. Merrill, 11 How. 375. See also Voce v. Lawrence, 4 McLean, 203. The heading of the notice: "United States of America, State of Illinois, County of Cook, ss. In the Circuit Court of the United States," was held not sufficiently irregular to avoid the deposition. Gormley v. Bunyan, 138 U. S. 623, 634. The omission of the name of the county from the caption is not a fatal defect. Van Ness v. Heineke, 2 Cranch, C. C. 259.

presence.[4] Consent may waive objection to the person who takes down the deposition.[5] The objection that the magistrate does not certify that the deposition was signed by the witness in his presence, is not fatal.[6] The certificate should state whether the parties were or were not present or represented,[7] and show the reasons for which the deposition was taken.[8] The notice need not be attached to the deposition.[9] If the deposition is sent by mail, the magistrate should certify that it was retained by him until sealed up and directed to the court.[10] The deposition need not state that the deposition has been sealed, provided that it appears by the envelope that the depo-

[4] Edmonson v. Barrel, 2 Cranch, C. C. 238; Rainer v. Haynes, Hempst. 689; Pettibone v. Derringer, 4 Wash. 215. Before the amendment of May 18, 1900, it was held that the certificate should show that the magistrate reduced the testimony to writing himself, or that it was done by the witness in his presence. Cook v. Burnley, 11 Wall. 659; U. S. v. Smith, 4 Day (Conn.), 121; Bell v. Morrison, 1 Pet. 351. 355; Bussard v. Catalino, 2 Cranch, C. C. 421; Donahue v. Roberts, 19 Fed. R. 863. *Contra*, Vasse v. Smith, 2 Cranch, C. C. 31; Van Ness v. Heineke, 2 Cranch, C. C. 259; Centre v. Keen, 2 Cranch, C. C. 198; Elliott v. Piersol, 1 Pet. 328, 335; Cook v. Burnley, 11 Wall. 659. But see Vasse v. Smith, 2 Cranch, C. C. 31; U. S. v. Smith, 4 Day (Conn.), 121; Marstin v. McRae, Hempst. 688; Rainer v. Haynes, Hempst. 689. In one case, a deposition was rejected because the magistrate certified that "the form," an evident slip of the pen for "the same," which were the words of the statute then in force, "was reduced to writing." Voce v. Lawrence, 4 McLean, 203; Burton v. Simmons, 2 Cranch, C. C. 195.

[5] Stewart v. Townsend, 41 Fed. R. 121.

[6] Van Ness v. Heineke, 2 Cranch, C. C. 259; Centre v. Keen, 2 Cranch, C. C. 198. If the deposition bears the witness' signature and appears to have been reduced to writing by the magistrate, it is sufficient, although the certificate does not say that it was signed by the witness. Bussard v. Catalino, 2 Cranch, C. C. 421. But see Cook v. Burnley, 11 Wall. 659; Donahue v. Roberts, 19 Fed. R. 863.

[7] Curtis v. Railway Co., 6 McLean, 401.

[8] Shutte v. Thompson, 15 Wall. 152; Sage v. Tauszky, 6 Cent. L. J. 7; Harris v. Wall, 7 How. 693; Woodward v. Hall, 2 Cranch, C. C. 235; Wheaton v. Love, 1 Cranch, C. C. 451; Jones v. Knowles, 1 Cranch, C. C. 523. See *supra*, § 286. It has been held that a certificate sufficiently shows the reason for making depositions, if the caption of the deposition states where the depositions were taken, without giving the distance from the place of taking to the place of trial; if the distance is in fact, and is well known by all parties to be, more than one hundred miles from the place of trial. Egbert v. Citizens' Ins. Co. of Mo., 7 Fed. R. 47.

[9] Stewart v. Townsend, 41 Fed. R. 121.

[10] Shankwiker v. Reading, 4 McLean, 240; Jones v. Neale, 1 Hughes, 268. But see Stewart v. Townsend, 41 Fed. R. 121.

sition was sealed.[11] If the magistrate have an official seal under which he usually certifies his acts, it seems that this certificate should be under that seal.[12] It seems that it will be presumed that he occupies the official position which he assumes in his certificate;[13] certainly so if he be a notary public and certifies under his notarial seal;[14] and this may always be proved by oral testimony like any other material fact.[15] The deposition may be directed to either the judge or the clerk of the court.[16] It cannot be read in evidence if intentionally opened anywhere but in court,[17] except by consent, which it will be well to have appear by writing duly signed and filed with or indorsed on the deposition.[18] Where the certificate fails to state certain material facts, by leave of the court the deposition may be withdrawn from the clerk's office, the certificate amended, and the deposition then refiled.[19] If an attorney appear and cross-examine a witness without objection, he thereby waives any lack of notice, or irregularity in the notice,[20] or in the form and manner of the proceedings,[21] or, it seems, an incompetency in the witness then known to him,[22] or any other formal defect. His presence, however, if he declines to take any part in the proceedings, does not.[23] It is the safer and the usual practice for the counsel present to note on the record all objections to

[11] Egbert v. Citizens' Ins. Co. of Mo., 7 Fed. R. 47, 50. If the deposition is sealed up with the seal of a corporation, across which are written the name or the names of the person or persons who took the deposition, it is sufficient. Re Thomas, 35 Fed. R. 337.

[12] Paul v. Lowry, 2 Cranch, C. C. 628. But see Price v. Morris, 5 McLean, 4.

[13] Ruggles v. Bucknor, 1 Paine, 358; Price v. Morris, 5 McLean, 4; Vasse v. Smith, 2 Cranch, C. C. 31; Whitney v. Huntt, 5 Cranch, C. C. 120. But see Tooker v. Thompson, 3 McLean, 92.

[14] Dinsmore v. Maroney, 4 Blatchf. 416.

[15] Paul v. Lowry, 2 Cranch, C. C. 628; Dunlop v. Munroe, 1 Cranch, C. C. 536.

[16] Thorp v. Orr, 2 Cranch, C. C. 335; Whitney v. Huntt, 5 Cranch, C. C. 120.

[17] Beale v. Thompson, 8 Cranch, 70; The Roscius, 1 Brown, Adm. 442; In re Thomas, 35 Fed. R. 337. The accidental opening in the mail of an envelope containing a deposition taken by a commission under Rule 67 does not authorize the suppression of the deposition. Eillert v. Craps, 44 Fed. R. 164.

[18] The Roscius, 1 Brown, Adm. 442.

[19] Gartside Coal Co. v. Maxwell, 20 Fed. R. 187; Donahue v. Roberts, 19 Fed. R. 863; Leatherberry v. Radcliffe, 5 Cranch, C. C. 550.

[20] Dinsmore v. Maroney, 4 Blatchf. 416.

[21] Shutte v. Thompson, 15 Wall. 152; In re Thomas, 35 Fed. R. 822.

[22] U. S. v. One Case, 1 Paine, 400.

[23] Harris v. Wall, 7 How. 693.

the form of questions; and to the admission of an exhibit; and a failure to note such an objection might be held to be a waiver[26] by a party who was present or represented at the examination. Irregularities are waived by consent to open depositions "without prejudice to any objections to the inclosed deposition other than relating to publication and opening, which is hereby waived."[25] An objection to the failure of a witness to produce a paper to which he referred, or which was called for, can only be made by a motion to suppress the deposition.[26] In general, all defects in form[27] or to the competency or relevancy of evidence[28] can only be raised by a motion to suppress the deposition, and seasonably made before the case is called for trial;[29] and the court may, and usually will, when such a motion is granted, allow an adjournment of the hearing in order that the testimony may be taken again, provided that the objection can then be obviated.[30] The denial of such a motion is no ground for the reversal of a judgment at common law, unless upon the trial an objection is duly made to the admission of the evidence and an exception taken.[31]

§ 288. Commissions issued under a dedimus potestatem. The Revised Statutes provide that "in any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a *dedimus potestatem* to take depositions according to common usage." "And the provisions of sections eight hundred and sixty-three, eight hundred and sixty-four, and eight hundred and sixty-five shall not apply to any depositions to be taken under the authority of this section."[1] This statute applies to criminal prosecutions,[2]

[24] *Cf.* Equity Rule 67; S. C. Rule 18.

[25] Stewart v. Townsend, 41 Fed. R. 121.

[26] Blackburn v. Crawford, 3 Wall. 175; Winans v. N. Y. E. R. Co., 21 How. 88. As to the transmission and identification of exhibits, see Giles v. Paxson, 36 Fed. R. 882; Bird v. Halsy, 37 Fed. R. 671; U. S. v. Fifty Boxes, 92 Fed. R. 601.

[27] Claxton v. Adams, 1 MacA. (D. C.) 496; Bank of Danville v. Travers, 4 Biss. 507; Brooks v. Jenkins, 3 McLean, 432; Uhle v. Burnham, 44 Fed. R. 729, 730; Howard v. Stillwell B. M. Co., 139 U. S. 199; Bibb v. Allen, 149 U. S. 481, 488. See Dickerson v. Matheson, 50 Fed. R. 73, 75.

[28] Ward v. Cochran (C. C. A.), 71 Fed. R. 127.

[29] Bibb v. Allen, 149 U. S. 481, 488.

[30] Luther v. The Merritt Hunt, 1 Newb. 4; Doe d. Moore v. Nelson, 3 McLean, 383.

[31] Union Pac. Ry. Co. v. Reece (C. C. A.), 56 Fed. R. 288.

§ 288. [1] U. S. R. S., § 866; Jones v. Oregon C. R. Co., 3 Sawyer, 523.

[2] U. S. v. Fifty Boxes and Packages of Lace, 92 Fed. R. 601.

informations for forfeitures,[3] actions at law,[4] and cases in equity.[5] The words "common usage," when applied to a suit in equity, signify the ordinary practice of courts of equity.[6] It has been held that the usage referred to is the common usage at the time of the revision of the Statutes of the United States in 1874;[7] that it does not direct the Federal courts to adopt all subsequent laws of the States wherein they sit;[8] that where, prior to 1874, the Federal courts within a district had adopted a practice of their own, such practice may be continued;[9] that accordingly in the Southern District of New York, those courts, even when sitting at common law, are not bound by the sections of the State Code of Civil Procedure regulating the execution of commissions to take testimony in foreign countries, but may take them in accordance with the old practice in the district upon written direct and cross-interrogatories; and when the answers of the witness are in a foreign language, they may be translated by the commissioner or under his direction, and only the answer, as thus interpreted be returned;[10] but that in districts where there is no settled practice the State practice should be followed.[11]

In a case of doubtful authority, the condition that a safe conduct be furnished to the plaintiff was inserted in an order for a commission to examine witnesses on the part of the defendant in a foreign country,[12] but a commission to prove documents was allowed without such a condition.[13] Depositions may be taken under this section of the Revised Statutes, even though the witness live within one hundred miles of the court where the cause is pending;[14] or in a country with which the United States are at war.[15] Such a commission is not granted as of course, but only upon good cause shown.[16] The applica-

[3] U. S. v. Cameron, 15 Fed. R. 794; U. S. v. Wilder, 14 Fed. R. 393.

[4] Peters v. Provost, 1 Paine, 64.

[5] Bischoffheim v. Baltzer, 10 Fed. R. 1.

[6] U. S. v. Parrott, 1 McAll. 447.

[7] U. S. v. Fifty Boxes and Packages of Lace, 92 Fed. R. 601.

[8] Ibid.

[9] Ibid.

[10] Ibid.

[11] Ibid.; Buddicum v. Kirk, 3 Cranch, 293; Jones v. Railroad Co., 3 Sawyer, 533; s. c., Fed. Cas. No. 7,486.

[12] Hollander v. Baiz, 40 Fed. R. 659. For a case where a commission was issued to examine an expert in a foreign country, see Holliday v. Schultzeberge, 57 Fed. R. 660.

[13] Hollander v. Baiz, 43 Fed. R. 85.

[14] Wellford v. Miller, 1 Cranch, C. C. 485; Russell v. M'Lellan, 3 W. & M. 157.

[15] Peters v. Provost, 1 Paine, 64.

[16] U. S. v. Parrott, 1 McAll. 447.

tion must be made in open court, and not to a judge at chambers;[17] and must be accompanied by an affidavit showing that the testimony which the party desires to take is material.[18] It seem that the commission need not specify the exact place where the depositions are to be taken; but if it do, the commissioners should conform to it in that respect.[19] Whether a party will or will not be required before the commission is issued to name the witnesses to be examined under it, depends upon the discretion of the court, to be exercised under the circumstances of each case.[20] Before the issue of the commission, the proposed interrogatories should be filed [21] and served upon the opposite party or his attorney;[22] and the latter given a reasonable time, usually fixed by the court, within which to object to them and to file cross-interrogatories.[23] If he omit to do so, the commission may be issued without further notice.[24] The interrogatories are drawn up substantially as those for the examination of witnesses within the jurisdiction of the court.[25] Objections to interrogatories or cross-interrogatories should be in the form of exceptions to them, and must be filed before the commission issues; or otherwise will be held waived.[26] If the parties cannot agree as to their form or substance, a reference may be ordered to a master, whose report will be reviewed by the court.[27] If there be any doubt as to the relevancy or propriety of an interrogatory, the ultimate decision thereon will be reserved until the hearing, and it will be allowed to stand and be answered. If there be no doubt as to its irrelevancy or impropriety, it will be stricken out before the commission issues.[28] A commission must also name or designate the commissioner or commissioners.[29] A woman may be a

[17] Peters v. Provost, 1 Paine, 64.

[18] Sutton v. Mandeville, 1 Cranch, C. C. 115; U. S. v. Parrott, 1 McAll. 447.

[19] Rhoades v. Selin, 4 Wash. 715.

[20] Parker v. Nixon, Baldw. 291.

[21] Cunningham v. Otis, 1 Gall. 166.

[22] Rhoades v. Selin, 4 Wash. 715; Merrill v. Dawson, Hempst. 563; s. c. *sub nom.* Fowler v. Merrill, 11 How. 375.

[23] Frevall v. Bache, 5 Cranch, C. C. 463; The Norway, 1 Ben. 493. Leave to cross-examine orally will rarely be given. Coates v. Merrick T. Co., 41 Fed. R. 73.

[24] Cocker v. F. H. & B. Co., 1 Story, 169.

[25] Rhoades v. Selin, 4 Wash. 715.

[26] Cocker v. F. H. & B. Co., 1 Story, 169.

[27] Cocker v. F. H. & B. Co., 1 Story, 169; Boudereau v. Montgomery, 4 Wash. 186.

[28] Cocker v. F. H. & B. Co., 1 Story, 169.

[29] Vanstophorst v. Maryland, 2 Dall. 401. A slight error in spelling the

commissioner, even though she be the wife of the witness to be examined.[20] The court may grant an order that exhibits annexed to a deposition already taken may be removed from the file and attached to a commission, provided that copies of them are left in their place.[21]

§ 289. Proceedings under a dedimus potestatem.— If the application does not state when and where the commission is to be executed, the party at whose instance, or the commissioner to whom it is issued, should notify the adverse party or his solicitor before the depositions are taken.[1] The notice should name the year as well as the day.[2] When, however, a party, after notice of an opportunity to do so, has neglected to file cross-interrogatories, no further notice to him is necessary.[3] The notice should be served personally, or else left at the house of the person upon whom it is made with a member of his family of sufficient intelligence.[4] The person with whom it is left, however, need not be informed of its purport.[5] Service by mail, unless actually received in time, is insufficient.[6] An hour's notice of the time of taking a deposition in the place where the attorney to whom it is given dwells, has been held sufficient.[7] The regulation of the proceedings under a commission is a matter in the discretion of the court issuing it.[8] A commissioner is appointed by and represents the court; and is no more than is an arbitrator the representative of the party nominating him.[9] The authority given to a commissioner is special, and must be strictly construed.[10] A commission issued to more than one

commissioner's name will not vitiate proceedings under the commission provided it clearly appears that the adverse party was not misled thereby. Bibb v. Allen, 149 U. S. 481, 488; Keene v. Meade, 3 Peters, 1, 6.

[20] The Norway, 2 Ben. 121.

[21] Daly v. Maguire, 6 Blatchf. 137.

§ 289. [1] Rhoades v. Selin, 4 Wash. 715; Knode v. Williamson, 17 Wall. 586; Merrill v. Dawson, Hempst. 563; s. c. *sub nom.* Fowler v. Merrill, 11 How. 375; Dunlop v. Monroe, 1 Cranch, C. C. 536.

[2] Knode v. Williamson, 17 Wall. 586.

[3] Merrill v. Dawson, Hempst. 563; s. c. *sub nom.* Fowler v. Merrill, 11 How. 375.

[4] Merrill v. Dawson, Hempst. 563; s. c. *sub nom.* Fowler v. Merrill, 11 How. 375.

[5] M'Call v. Towers, 1 Cranch, C. C. 41.

[6] Walker v. Parker, 5 Cranch, C. C. 639.

[7] Nicholls v. White, 1 Cranch, C. C. 59.

[8] Cunningham v. Otis, 1 Gall. 166.

[9] Jones v. Oregon C. R. Co., 3 Saw. 523; Gilpins v. Consequa, Pet. C. C. 85; Guppy v. Brown, 4 Dall. 410.

[10] Guppy v. Brown, 4 Dall. 410; Armstrong v. Brown, 1 Wash. 43;

commissioner must be executed and returned by all of them,[11] unless it is otherwise so provided in it;[12] and if any one else, except a judge in a foreign country whose laws do not permit a private individual to take testimony alone,[13] join in its execution or return, the testimony taken under it will also be suppressed.[14] A commission must be executed at the time and place named in it, or in the notice.[15] It has been held that the witnesses under such a commission should be examined alone; and the parties are not allowed to be present either in person or by attorney, unless the court otherwise directs.[16] The interrogatories may be shown the witness before he is called upon to give his testimony.[17] He must be examined as to each interrogatory and cross-interrogatory; and if he improperly omits to answer any one of them; or if any one of them, an answer to which would be legal evidence, is not put to him, his whole deposition may be suppressed at the instance of the party who might be thereby injured.[18] If, however, the deposition have been issued *ex parte*, the adverse party having omitted to file cross-interrogatories after an opportunity to do so has been given him, it has been said that as many, or as few, of these interrogatories as the party who filed them thinks proper may be put, provided that the general interrogatory is not omitted.[19] If the cross-interrogatories are put, it makes no difference how soon after the direct interrogatories have been answered the witness is called upon to answer them.[20] No additional inter-

Boudereau v. Montgomery, 4 Wash. 186.

[11] Guppy v. Brown, 4 Dall. 410; Armstrong v. Brown, 1 Wash. 43; Munns v. Dupont, 3 Wash. C. C. 31.

[12] The Griffin, 4 Blatchf. 208; Lonsdale v. Brown, 3 Wash. 404.

[13] Winthrop v. Union Ins. Co., 2 Wash. 7.

[14] Willings v. Consequa, Pet. C. C. 301; Barnet v. Day, 3 Wash. 243.

[15] Rhoades v. Selin, 4 Wash. 715; Boudereau v. Montgomery, 4 Wash. 186; Knode v. Williamson, 17 Wall. 586; Buddicum v. Kirk, 3 Cranch, 293. As to waiver, see Gartside Coal Co. v. Maxwell, 20 Fed. R. 187.

[16] Cunningham v. Otis, 1 Gall. 166. But see Knode v. Williamson, 17 Wall. 586; Merrill v. Dawson, Hempst. 563; s. c. *sub nom.* Fowler v. Merrill, 11 How. 375.

[17] North Carolina R. Co. v. Drew, 3 Woods, 691.

[18] Ketland v. Bissett, 1 Wash. 144; Nelson v. U. S., Pet. C. C. 235; Winthrop v. Union Ins. Co., 2 Wash. 7; Bell v. Davidson, 3 Wash. C. C. 328; Richardson v. Golden, 3 Wash. C. C. 109; Dodge v. Israel, 4 Wash. 323; Gilpins v. Consequa, Pet. C. C. 85; s. c., 3 Wash. 184. But see Gass v. Stinson, 3 Sumn. 98.

[19] Merrill v. Dawson, Hempst. 563; s. c. *sub nom.* Fowler v. Merrill, 11 How. 375.

[20] Gilpins v. Consequa, Pet. C. C. 85; s. c., 3 Wash. 184.

rogatories, however, can be filed with or put by or before the commissioner.[21] Under extraordinary circumstances the examination of a witness not named in the commission might be permitted.[22] The deposition may be taken down in writing either by the magistrate or by the deponent in the presence of the magistrate;[23] but not by the counsel for either of the parties.[24] If exhibits are referred to by the witness, they should be annexed to the deposition or identified by marks or reference.[25] A paper referred to by a witness, but which is neither in his own power nor in that of the party making the objection, need not, however, be included in the deposition or thus identified.[26] It has been held that the deposition need not be signed by the witness.[27] A deposition prepared and signed some time before the oath is administered is improper and will be suppressed.[28] The depositions should be attached to the commission, and, with them, a certificate by all the commissioners that they have complied with the requirements above described. The commission should then be sent or delivered to the clerk's office of the court unopened, and must there remain so till publication is allowed by order or consent.[29] The fact that it was forwarded through the embassy mail-bag first to Washington, and thence to the clerk, does not invalidate the proceedings.[30] The return, or certificate, of the commissioners should state that they were sworn, unless that ceremony has been waived, or they are officers qualified to administer an oath.[31] The return should also state the time and place of taking the depositions;[32] that each witness was sworn or

[21] Cunningham v. Otis, 1 Gall. 166; Merrill v. Dawson, Hempst. 563; s. c. *sub nom.* Fowler v. Merrill, 11 How. 375.

[22] The Infanta, Abbott's Adm. 263.

[23] Stockwell v. U. S., 3 Cliff. 284; Keene v. Meade, 3 Pet. 1; s. c. *sub nom.* Meade v. Keane, 3 Cranch, C. C. 51.

[24] U. S. v. Pings, 4 Fed. R. 714. But see Nicholls v. White, 1 Cranch, C. C. 59; Atkinson v. Glenn, 4 Cranch, C. C. 134.

[25] Dodge v. Israel, 4 Wash. 328.

[26] Winans v. New York & Erie R. Co., 21 How. 88.

[27] Ketland v. Bissett, 1 Wash. 144.

[28] Dodge v. Israel, 4 Wash. 328; North Carolina R. Co. v. Drew, 3 Woods, 691.

[29] Boudereau v. Montgomery, 4 Wash. 186; Frevall v. Bach, 5 Cranch, C. C. 463; U. S. v. Price, 2 Wash. 356.

[30] U. S. v. Fifty Boxes and Packages of Lace, 92 Fed. R. 601.

[31] Frevall v. Bach, 5 Cranch, C. C. 463; Hoyt v. Hammekin, 14 How. 346. But see Gilpins v. Consequa, Pet. C. C. 85; s. c., 4 Wash. 184.

[32] Rhoades v. Selin, 4 Wash. 715; Boudereau v. Montgomery, 4 Wash. 186.

affirmed, but not that he was cautioned; nor need it state the form of the oath.[33] The return need not state in whose handwriting the depositions were taken down;[34] nor, if the witness was an alien, whether or not he was examined by means of an interpreter;[35] nor that it was subscribed by a sworn interpreter, when it states that the interpreter was sworn and every page is subscribed by a signature purporting to be that of the interpreter;[36] nor, it has been held, need the answers, when an interpreter was used, be transmitted in the foreign language of the witness as well as in the translation.[37] The certificate will be presumptive evidence of the facts therein stated in relation to the execution of the commission.[38] Otherwise, proceedings under these commissions should conform substantially to those under commissions to examine witnesses within the jurisdiction of the court.[39] Any objection to the form or manner of the proceedings can only be raised by a motion to suppress the deposition,[40] which should be seasonably made before the case is called for trial;[41] provided that sufficient time within which to make such a motion remains between the return of the commission and the hearing.[42] Should a foreign plaintiff refuse to testify before a commission when required so to do, the court may deny him relief in the suit.[43]

§ 290. **Letters rogatory.**—When the witnesses whose testimony is desired are in a country whose laws do not permit of the execution of a commission issued from a foreign court,

[33] Jones v. Oregon C. R. Co., 3 Saw. 528; Keene v. Meade, 3 Pet. 1; s. c. *sub nom.* Meade v. Keane, 3 Cranch, C. C. 51.

[34] Keene v. Meade, 3 Pet. 1; s. c. *sub nom.* Meade v. Keane, 3 Cranch, C. C. 51; Jones v. Oregon C. R. Co., 3 Saw. 528.

[35] Gilpins v. Consequa, Pet. C. C. 85; s. c., 3 Wash. 184.

[36] U. S. v. Fifty Boxes and Packages of Lace, 92 Fed. R. 601, 603, 604.

[37] Ibid.

[38] Merrill v. Dawson, Hempst. 563; s. c. *sub nom.* Fowler v. Merrill, 11 How. 375; Boudereau v. Montgomery, 4 Wash. 186; Winter v. Simonton, 3 Cranch, C. C. 104.

[39] Jones v. Oregon C. R. Co., 3 Saw. 528; U. S. v. Parrott, 1 McAll. 447. See § 284.

[40] Blackburn v. Crawfords, 3 Wall. 175; Winans v. New York & Erie R. Co., 21 How. 88; Doane v. Glenn, 21 Wall. 33; York Co. v. Central R. Co., 3 Wall. 107; Walker v. Parker, 5 Cranch, C. C. 639.

[41] Bibb v. Allen, 149 U. S. 481, 488. See Dickerson v. Matheson, 50 Fed. R. 73, 75; *supra*, § 287.

[42] Sergeant v. Biddle, 4 Wheat. 508; Mechanics' Bank v. Seton, 1 Pet. 299; Buddicum v. Kirk, 3 Cranch, 293; Alsop v. Com. Ins. Co., 1 Sumn. 451.

[43] Heath v. Erie R. Co., 9 Blatchf. 316. *Cf. infra*, § 290, note 2.

their testimony can only be taken by means of letters rogatory. "This method of obtaining testimony from witnesses in a foreign country has always been familiar in the Courts of Admiralty; but it is also deemed to be within the inherent powers of all courts of justice. For, by the law of Nations, courts of Justice, of different countries, are bound mutually to aid and assist each other, for the furtherance of justice; and hence, when the testimony of a foreign witness is necessary, the Court before which the action is pending, may send to the Court within whose jurisdiction the witness resides, a writ, either patent or close, usually called a letter rogatory, or a commission *sub mutuae vicissitudinis obtentu, ac in juris subsidium*, from those words contained in it. By this instrument the court abroad is informed of the pendency of the cause, and the names of the foreign witnesses, and is requested to cause the depositions to be taken, in due course of law, for the furtherance of justice; with an offer, on the part of the tribunal making the request, to do the like for the other in a similar case. The writ or commission is usually accompanied by interrogatories, filed by the parties, on each side, to which the answers of the witnesses are desired. The commission is executed by the judge who receives it, either by calling the witness before himself, or by the intervention of a commissioner for that purpose; and the original answers, duly signed and sworn to by the deponent, and properly authenticated," or duly authenticated copies of the same, "are returned with the commission to the Court from which it issued. The Court of Chancery has always freely exercised this power, by a commission, either directed to foreign magistrates, by their official designation, or more usually, to individuals by name; which latter course, the peculiar nature of its jurisdiction and proceedings enables it to induce the parties to adopt by consent, where any doubt exists as to its inherent authority."[1] A special application for an

§ 290. [1] Greenleaf's Ev., § 320. See for a good form, Nelson v. U. S., 1 Pet. C. C. 236, note. See also Cunningham v. Otis, 1 Gall. 166; Hall's Adm. Pr., part 2, tit. 19, vol. 1, *cum add.*, and tit. 27, *cum add.*, pp. 87, 88, 55, 60; Clerke's Praxis, tit. 27; 1 Roll. Abr. 530, pl. 15; Oughton's Ordo Judiciorum, vol. 1, pp. 150, 152, tit. 95, 96; Wharton's Int. Law Dig., vol. III, § 413.

order for letters rogatory may be made to the court, and will be granted in the first instance without issuing a commission, upon satisfactory proof that the authorities abroad will not allow the testimony to be taken in any other manner.[2] "When any commission or letter rogatory, issued to take the testimony of any witness in a foreign country, in any suit in which the United States are parties or have any interest, is executed by the court or the commissioner to whom it is directed, it shall be returned by such court or commissioner to the minister or consul of the United States nearest the place where it is executed. On receiving the same, the said minister or consul shall indorse thereon a certificate, stating when and where the same was received, and that the said deposition is in the same condition as when he received it; and he shall thereupon transmit the said letter or commission so executed and certified by mail, to the clerk of the court from which the same issued, in the manner in which his official dispatches are transmitted to the government. And the testimony of witnesses so taken and returned shall be read as evidence on the trial of the suit in which it was taken, without objection as to the method of returning the same."[3] The statutes further provide for the taking of testimony under a commission or in pursuance of letters rogatory issued from a court in a foreign country, with which the United States are at peace, to take the testimony of a witness residing within the United States, in any suit for the recovery of money or property depending in such foreign court in which the government of such foreign country is a party or has an interest, as follows: —

"The testimony of any witness residing within the United States, to be used in any suit for the recovery of money or property depending in any court in any foreign country with which the United States are at peace, and in which the government of such foreign country shall be a party or shall have an interest, may be obtained, to be used in such suit. If a commission or letters rogatory to take such testimony, together with specific written interrogatories, accompanying the same

[2] Hoffman's Ch. Pr. 482; Daniell's Ch. Pr. (3d Am. ed. by Judge Perkins), vol. II, p. 953; Gason v. Wordsworth, 2 Ves. Sen. 336; Lincoln v. Battelle, 6 Wend. (N. Y.) 475; Gross v. Palmer, 105 Fed. R. 833.

[3] U. S. R. S., § 875.

and addressed to such witness, shall have been issued from the court in which such suit is pending, on producing the same before the district judge of any district where the witness resides or shall be found, and on due proof being made to such judge that the testimony of any witness is material to the party desiring the same, such judge shall issue a summons to such witness requiring him to appear before the officer or commissioner named in such commission or letters rogatory, to testify in such suit. And no witness shall be compelled to appear or to testify under this section except for the purpose of answering such interrogatories so issued and accompanying such commission or letters: *Provided*, That when counsel for all the parties attend the examination, they may consent that questions in addition to those accompanying the commission or letters rogatory may be put to the witness, unless the commission or letter rogatory exclude such additional interrogatories. The summons shall specify the time and place at which the witness is required to attend, which place shall be within one hundred miles of the place where the witness resides or shall be served with such summons."[4] It has been held that criminal proceedings,[5] and "proceedings relating to the investigation as to the smuggling of some cases of cotton,"[6] do not come within this statute.

"No witness shall be required, on such examination or any other under letters rogatory, to make any disclosure or discovery which shall tend to criminate him either under the laws of the State or Territory within which such examination is had, or any other, or any foreign State."[7]

"If any person shall refuse or neglect to appear at the time and place mentioned in the summons issued in accordance with section forty hundred and seventy-one, or, if upon his appearance he shall refuse to testify, he shall be liable to the same penalties as would be incurred for a like offense on the trial of a suit in the District Court of the United States."[8]

"Every witness who shall so appear and testify shall be allowed, and shall receive from the party at whose instance he shall have been summoned, the same fees and mileage as are

[4] U. S. R. S., § 4071.

[5] Matter of the Spanish Consul, 1 Ben. 225.

[6] In re Letters Rogatory, 36 Fed. R. 306.

[7] U. S. R. S., § 4072.

[8] U. S. R. S., § 4073.

allowed to witnesses in suits depending in the District Courts of the United States."[9]

"When letters rogatory are addressed from any court of a foreign country to any Circuit Court of the United States, a commissioner of such Circuit Court designated by said court to make the examination of the witnesses mentioned in said letters, shall have power to compel the witnesses to appear and depose in the same manner as witnesses may be compelled to appear and testify in courts."[10]

[9] U. S. R. S., § 4074.

[10] U. S. R. S., § 875, as amended by 19 St. at L. 241 (U. S. R. S. 1 Supp. 266).

CHAPTER XX.

DISMISSING BILLS OTHERWISE THAN AT A HEARING.

§ 291. Dismissal of bills by the plaintiff.—The plaintiff may dismiss his bill without costs at any time before the defendant's appearance.[1] He may obtain the order for the dismissal as of course upon motion or petition, usually by the latter;[2] but if the dismissal is a violation of an agreement between him and the defendant, the order granting it may be subsequently vacated.[3] After appearance and before a decree or decretal order, a plaintiff can usually obtain a dismissal upon payment of the costs of such of the defendants as have appeared;[4] but not, if they or any of them would be injured thereby.[5] Leave to dismiss may be refused where the defendant claims affirmative relief by cross-bill, or by answer in a case where he is entitled to affirmative relief on an answer.[6] For example, where the bill was filed to enforce a false claim to property or an instrument, which the evidence showed had been obtained by fraud, in which case the defendant without filing a cross-bill would be entitled if successful to a decree declaring the plaintiff's claim unfounded, and enjoining him from again setting it up;[7] or where the bill was filed to set aside a patent on the ground of interference, when the defendant may obtain affirmative relief by answer.[8] Leave has been

§ 291. [1] Thompson v. Thompson, 7 Beav. 350.

[2] Daniell's Ch. Pr. (5th Am. ed.) 790, 791.

[3] Betts v. Barton, 8 Jur. (N. S.) 154.

[4] Chicago & A. R. Co. v. Union R. M. Co., 109 U. S. 702; Conn. & P. R. Co. v. Hendee, 27 Fed. R. 678.

[5] Cooper v. Lewis, 2 Phil. 178; Ainslie v. Sims, 17 Beav. 174; Booth v. Leycester, 1 Keen, 247; Bank of S. C. v. Rose, 1 Rich. Eq. (S. C.) 292; Stevens v. The Railroads, 4 Fed. R. 97. See W. U. Tel. Co. v. Am. Bell Tel. Co., 50 Fed. R. 662. This sentence of the text was quoted with approval by Hanford, J., in Hershberger v. Blewett, 55 Fed. R. 170.

[6] Electrical Acc. Co. v. Brush El. Co., 44 Fed. R. 602; C. & A. R. Co. v. Rolling M. Co., 109 U. S. 702; Stevens v. The Railroads, 4 Fed. R. 97; Hat Sweat Mfg. Co. v. Waring, 46 Fed. R. 87; City of Detroit v. Detroit City Ry. Co., 55 Fed. R. 569.

[7] Stevens v. The Railroads, 4 Fed. R. 97; Hat S. Mfg. Co. v. Waring, 46 Fed. R. 87; *supra*, § 171.

[8] Electrical Acc. Co. v. Brush El. Co., 44 Fed. R. 602; *supra*, § 171.

refused when the defendant by the dismissal would have lost the benefit of an adjudication made in the previous proceedings in the suit.[9] Leave may be granted upon terms, as for example, that the complainant stipulate to allow defendant's evidence to be used in any subsequent suit.[10] An executor or other person, who has filed a bill in a representative capacity in good faith with reasonable grounds for so doing, may be excused payment of costs.[11] The motion for such an order should be upon notice.[12] The same practice is followed when a plaintiff sues in behalf of himself and others, provided that no one has previously joined with him as co-plaintiff,[13] unless, perhaps, others have contributed to the expenses of the suit and wish it continued.[14] After other members of the class have joined as co-plaintiffs in the suit, the plaintiff cannot dismiss the bill without their consent.[15] The majority of the stockholders in a corporation cannot always have a suit discontinued against the wishes of its directors.[16] After a decree or decretal order, whether parol or interlocutory, the plaintiff may not discontinue without the consent of all parties who have acquired rights by the decree,[17] including creditors who have filed their claims pursuant to a direction in the same.[18] The usual course pursued by one, in whose name without his consent a bill has been filed, is to move, on notice to the solicitor who appeared for him and to any other the parties who have appeared, to have it taken off the file.[19] Upon this being done, he may recover from the solicitor who filed the bill,[20] his costs, as well as any costs he may have been compelled to pay a defendant. A plaintiff cannot,

[9] Hershberger v. Blewett, 55 Fed. R. 170, 172; Daniell's Ch. Pr. (5th ed.) 793. But see W. U. Tel. Co. v. Am. Bell T. Co., 50 Fed. R. 662.

[10] Am. Z. Co. v. Celluloid Mfg. Co., 32 Fed. R. 809.

[11] Arnoux v. Steinbrenner, 1 Paige (N. Y.), 82.

[12] Am. Z. Co. v. Celluloid Mfg. Co., 32 Fed. R. 809; Gregory v. Pike (C. C. A.), 67 Fed. R. 837.

[13] Hanford v. Storie, 2 Sim. & S. 196; Armstrong v. Storer, 9 Beav. 277.

[14] Ex parte Railroad Co., 95 U. S. 221; Miller v. Liggett & M. T. Co., 7 Fed. R. 91.

[15] Belmont N. Co. v. Columbia I. & S. Co., 46 Fed. R. 836.

[16] Railway Co. v. Alling, 99 U. S. 463.

[17] Guilbert v. Hawles, 1 Ch. Cas. 40; Carrington v. Holly, 1 Dick. 280; Hershberger v. Blewett, 55 Fed. R. 170; Gregory v. Pike (C. C. A.), 67 Fed. R. 837; Garner v. Second Nat. Bank, 67 Fed. R. 833.

[18] Johnson v. Miller, 96 Fed. R. 271.

[19] Palmer v. Walesby, L. R. 3 Ch. App. 732; Titterwan v. Osborne, 1 Dick. 350; Hood v. Phillips, 6 Beav. 176.

[20] Palmer v. Walesby, L. R. 3 Ch.

it seems, dismiss a part only of his bill. The proper course is for him to amend by omitting it.[21] When there is more than one plaintiff, one of them may by special leave of the court have the bill dismissed with costs so far as concerns himself, provided that no injury will thereby result to any other party.[22] If there are several defendants, a plaintiff may obtain an order dismissing his bill as to some of them, provided that no injury will be thereby done the rest.[23] A dismissal at the plaintiff's request before a hearing is usually without prejudice,[24] unless evidence has been taken and the cause set down for a hearing, when it should be granted only by a decree dismissing the bill upon the merits.[25] The entry of an order of discontinuance upon consent of both parties amounts in effect to a dismissal of the bill.[26] The dismissal of a bill or of part of a bill does not authorize the removal of the paper from the clerk's office unless the order so directs; and such a direction will rarely be given.[27] Otherwise, the paper remains a part of the record, and may be used as evidence of any admission therein contained.[28] An order dismissing a bill may be set aside.[29] An order denying a motion to dismiss a bill as to a party was held to be appealable.[30]

§ 292. Dismissal of bills for want of prosecution.— A defendant is entitled to an order dismissing the plaintiff's bill: if the plaintiff does not reply to any plea, or set down any plea or demurrer for argument on the rule-day when the same is filed, or on the next succeeding rule-day, unless the time within which to do either of those things has been enlarged by a judge of the court;[1] if the plaintiff does not reply to that defendant's answer on or before the next succeeding rule-day after its

App. 732; Wright v. Castle, 3 Meriv. 12.

[21] Camden & Amboy R. Co. v. Stewart, 4 C. E. Green (N. J.), 69. But see Lyster v. Stickney, 12 Fed. R. 609.

[22] Holkirk v. Holkirk, 4 Madd. 50; Winthrop v. Murray, 7 Hare, 150.

[23] Baily v. Lambert, 5 Hare, 178.

[24] Daniell's Ch. Pr. (5th Am. ed.) 793. But see Stevens v. The Railroads, 4 Fed. R. 97; and § 300.

[25] Rumbly v. Stainton, 24 Ala. 712; Rochester v. Lee, 1 Macn. & G. 467. See Stevens v. The Railroads, 4 Fed. R. 97.

[26] Pictet A. I. Co. v. N. Y. I. M. Co., 12 Fed. R. 816.

[27] Lyster v. Stickney, 12 Fed. R. 609, 610.

[28] Ibid.

[29] Gregory v. Pike (C. C. A.), 67 Fed. R. 837.

[30] Brush El. Co. v. California El. L. Co. (C. C. A.), 51 Fed. R. 557; s. c., 52 Fed. R. 945.

§ 292. [1] Rule 38.

filing, provided that no exceptions have been taken to the answer, or that any exceptions filed are still undecided, or that the cause is not set down for a hearing on bill and answer;[2] and if no testimony is taken by the plaintiff within three months after the cause is at issue,[3] or within any shorter time that may be assigned by the court;[4] although it might be held that in such a case the defendant must first set the cause down for a hearing. The plaintiff's time for doing any of these things may, however, be enlarged, either before or after it has expired, by the court or by consent at any time;[5] and the taking of any subsequent step by the defendant in the cause, before attempting to take advantage of the default, will usually be deemed a waiver of the same.[6] The refusal of the plaintiff and of the State court to recognize a removal is no defense to such an action to dismiss for want of prosecution in the Federal court,[7] although the court might, in its discretion, consider this, if made in good faith, as a ground for allowing him further time. A failure to take out subpœnas for two years after a bill was filed has been held to justify a dismissal of the bill.[8]

§ 293. Dismissal for want of jurisdiction.— The Judiciary Act of 1875 provides that "if, in any suit commenced in a Circuit Court or removed from a State court to a Circuit Court of the United States, it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this Act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or

[2] Rule 66; Reynolds v. First Nat. Bank, 112 U. S. 405.

[3] Rule 69; Adams v. Howard, 21 Off. Gaz. 264; Mackaye v. Mallory, 80 Fed. R. 256. For the practice in the Southern District of New York, see also *infra*, § 296; Welsbach L. Co. v. Mahler, 88 Fed. R. 427. For a case where the delay was held excusable, see Beirne v. Wadsworth, 36 Fed. R. 614.

[4] Amendment of 1869 to Rule 67.

[5] Rules 38, 66, 69; Ex parte Poultney v. City of La Fayette, 12 Pet. 472.

[6] Allen v. Mayor, 7 Fed. R. 483; Jackson v. Ivimey, L. R. 1 Eq. 693.

[7] McMullen v. Northern Pac. R. Co., 57 Fed. R. 16.

[8] Houston v. City and County of San Francisco, 47 Fed. R. 337; Bancroft v. Sawin, 143 Mass. 144.

remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."[1] The court should do this of its own motion, as soon as it discovers its want of jurisdiction or the improper or collusive joinder.[2] The Supreme Court has said that this provision of the Act of 1875 is salutary, and that it is the duty of the Circuit Courts to exercise their power under it in all proper cases.[3] Neither party has the right, however, without pleading it within the time allowed for that purpose, to introduce evidence to contradict averments of the jurisdictional facts;[4] but if, from any source, the court is led to suspect that its jurisdiction has been imposed upon by the collusion of the parties or in any other way, it may of its own motion cause the necessary inquiry to be made, either by having the proper issue joined and tried, or by some other appropriate form of proceeding, and act as justice may require for its own protection against fraud or imposition.[5] In such a case the party that sought the jurisdiction of the Federal court should have an opportunity to be heard on the motion, and to meet it by appropriate evidence.[6] A judge cannot thus dismiss or remand a case upon his personal conviction, although it amounts to a moral certainty; the collusion or lack of jurisdiction must be legally proved, and appear upon the record.[7] If there is no collusion and an orig-

§ 293. [1] Act of March 3, 1875, ch. 137, § 5 (18 St. at L. 472). See *supra*, § 18, and *infra*, § 893.

[2] Williams v. Nottawa, 104 U. S. 209.

[3] Williams v. Nottawa, 104 U. S. 209, 212.

[4] Hartog v. Memory, 116 U. S. 588; Davies v. Lathrop, 13 Fed. R. 565; Cuthbert v. Galloway, 35 Fed. R. 466; Deputron v. Young, 134 U. S. 241. A refusal by the court upon the trial to allow the defendant to file a plea on the question of the plaintiff's citizenship was held not to be reviewable upon a writ of error. Mexican C. Ry. Co. v. Pinkney, 149 U. S. 194. It has been said that a defect in the jurisdiction of the Circuit Court for the Southern District of York, because the cause of action arose in the Northern District of that State, may be taken by answer as well as by plea, but unless raised somewhere in the pleadings will be waived. Black v. Thorne, 10 Blatchf. 66.

[5] Hartog v. Memory, 116 U. S. 588; Morris v. Gilmer, 129 U. S. 315.

[6] Hartog v. Memory, 116 U. S. 588, 590–592; Barry v. Edmunds, 116 U. S. 550.

[7] Barry v. Edmunds, 116 U. S. 550, 559; Deputron v. Young, 134 U. S. 241, 252. Where a plaintiff had acquired the causes of action which he sought to enforce, solely for the purpose of collection in the Federal courts under an agreement to pay back a certain proportion of the net proceeds to his assignors, who could not have sued therein, it was held that the suits should be dismissed.

inal defect in the jurisdiction has been cured before the objection is raised, it seems that the suit may be retained.[8] If the record does not show affirmatively that the court has jurisdiction, the case may be dismissed at any time by motion before issue joined;[9] after as well as before judgment; and the objection may be taken for the first time in the appellate court.[10] An appellate court will rarely direct the dismissal of a case for collusion; but will ordinarily direct a trial of that question by the court below.[11] When, after all the pleadings are filed in a suit which was brought in or removed to a Federal court, on the claim that it is a case arising under the Constitution and laws of the United States, it appears that the averments upon which the jurisdiction is claimed are immaterial, it is the duty of the court to dismiss or remand the cause.[12] To justify a dismissal under this statute, the court must be satisfied that the

Farmington v. Pillsbury, 114 U. S. 138; Williams v. Nottawa, 104 U. S. 209; Bernards Tp. v. Stebbins, 109 U. S. 341; New Providence v. Halsey, 117 U. S. 336; Little v. Giles, 118 U. S. 596; Norton v. European & N. A. Ry. Co., 32 Fed. R. 865. Where land worth at least $1,800 was conveyed by a citizen of the State to an alien laborer without means, who agreed to pay $600 for the same, paid only $10 in cash, and gave a mortgage for the balance, it was held that the facts did not show a simulated transfer and justify a dismissal of the bill. Woodside v. Ciceroni (C. C. A.), 93 Fed. R. 1. For the reversal of a judgment of dismissal because the evidence did not prove that the value of the matter in dispute was below the jurisdictional amount, see Wetmore v. Rymer, 169 U. S. 115. *Cf.* Blackburn v. Portland Gold Mine Co., 175 U. S. 571. As to what is not collusion, see Bowdoin College v. Merritt, 63 Fed. R. 213. Before the Act of 1875, it was held that a defendant, between whom and the complainant the requisite difference of citizenship existed, could not raise an objection on account of the citizenship of another defendant. Harrison v. Uramm, 1 Story, 64; Pond v. Vt. Valley R. Co., 12 Blatchf. 280.

[8] Pacific R. Co. v. Ketchum, 101 U. S. 289, 299.

[9] Bicycle S. Co. v. Gordon, 57 Fed. R. 529; La Vega v. Lapsley, 1 Woods, 428; Municipal Inv. Co. v. Gardiner, 62 Fed. R. 954. But see Fuller v. Metropolitan L. Ins. Co., 31 Fed. R. 696. "Such an objection ought to be raised at the first opportunity, and delay in its presentation should be considered in examining into the grounds upon which it is alleged to rest." Deputron v. Young, 134 U. S. 241, 251. It has been held that upon a motion to dismiss, leave to amend may be given where it does not affirmatively appear that the court has no jurisdiction. Home Ins. Co. of N. Y. v. Nobles, 63 Fed. R. 641.

[10] Grace v. Am. C. Ins. Co., 109 U. S. 278; Bors v. Preston, 111 U. S. 252; Mansfield, C. & L. M. Co. v. Swan, 111 U. S. 379.

[11] Ashley v. Supervisors of Presque Isle County (C. C. A.), 60 Fed. R. 55.

[12] Robinson v. Anderson, 121 U. S. 522; McCain v. Des Moines, 174 U. S. 168; Shreveport v. Cole, 129 U. S. 36; New Orleans v. Benjamin, 153 U. S. 411. See *infra*, § 393.

object was to create a case cognizable in the Federal courts.[13] Where a collusive transfer of the cause of action was evidently made for another purpose, it was held that the jurisdiction should be retained.[14] Admissions by the defendant after a suit is brought cannot by reducing the matter in dispute divest the court of jurisdiction.[15] A dismissal upon this ground should be without prejudice.[16] A motion to dismiss for want of equity can regularly be made only at a hearing.[17]

§ 294. Dismissal for failure to perfect or revive a suit.— When a suit has abated or become otherwise defective before a decree, the party or parties against whom it can be continued may, upon notice served upon the person or persons entitled to revive or supply the defect in the same, move for and obtain an order, directing that these revive or supply the defect, within a certain limited time to be fixed by the court, or that else the bill be dismissed.[1] If the suit abate by the death of one of several co-plaintiffs, the order may be obtained against the survivors; and it seems that the objection that there is no personal representative of the deceased plaintiff will not prevent the court from granting such an order.[2] It is irregular in such cases to move to dismiss a bill for want of prosecution; and an order to that effect, if obtained, will be discharged for irregularity.[3] A bill may be dismissed at a defendant's motion for the plaintiff's failure to serve with process another defendant named in the bill who is a necessary party to the suit.[4]

§ 295. Election.— When the plaintiff is suing both at law and in equity, at the same time, for the same matter, the defendant is entitled to an order that the plaintiff elect whether

[13] Lanier v. Nash, 121 U. S. 404, 410; Manhattan L. Ins. Co. v. Broughton, 109 U. S. 121.

[14] Lanier v. Nash, 121 U. S. 404.

[15] Fuller v. Met. L. Ins. Co., 37 Fed. R. 168. See Chicago C. Co. v. Fogg, 53 Fed. R. 72, 76, and *supra*, § 16.

[16] Thompson v. Railroad Co., 6 Wall. 134; Kendig v. Dean, 97 U. S. 423; Van Norden v. Morton, 99 U. S. 378; Williams v. Nottawa, 104 U. S. 209.

[17] La Vega v. Lapsley, 1 Woods, 428; Betts v. Lewis, 19 How. 72; Fuller v. Met. L. Ins. Co., 31 Fed. R. 696. But see Person v. Fidelity & Cas. Co., 84 Fed. R. 759. *Cf.* Willis v. Willis, 42 W. Va. 522; s. c., 26 S. E. R. 515; Carlsbad v. Tibbetts, 51 Fed. R. 852; State v. Hemingway, 69 Miss. 491; Reilly v. Reilly, 139 Ill. 180; Russell v. Lamb, 82 Iowa, 558.

§ 294. [1] Adamson v. Hall, 1 T. & R. 258; Bolton v. Bolton, 2 S. & S. 371.

[2] Hinde v. Morton, 2 H. & M. 368.

[3] Robinson v. Norton, 10 Beav. 484; Boddy v. Kent, 1 Meriv. 361; Sellers v. Dawson, 2 Dick. 738.

[4] Jessup v. Ill. Cent. R. Co., 36 Fed. R. 735; Picquet v. Swan, 5 Mason, 561.

he will proceed in equity or at law.[1] The case of a mortgagee is an exception to this rule; for, in the absence of any statutory restriction, he can proceed at the same time to foreclose his mortgage in equity and sue on the bond at law.[2] This exception, however, it has been held in England, does not extend to the case of a vendor seeking to enforce his lien and sue at law for his debt.[3] In a special case, the plaintiff may be allowed to proceed partially at equity and partially at law, and compelled to make a special election.[4] The principle of election has been extended to a case where the plaintiff sued at once in both a foreign and a domestic court.[5] The defendant cannot move for the order until after he has answered, and the time for exceptions has expired without one being taken, or the answer has been adjudged sufficient.[6] A joint plea and answer is not, it seems, sufficient to enable a defendant to obtain such an order.[7] The order should allow the plaintiff a reasonable time within which to make his election.[8] The plaintiff may move to discharge the order for irregularity in obtaining it, or upon the merits confessed in the answer or proved in an affidavit.[9] If, upon such a motion, any doubt arises as to whether the suit in equity and the action at law are for the same matter, it is customary to direct an inquiry into that fact;[10] during the progress of which, all proceedings in both courts are usually stayed,[11] unless the plaintiff can show that justice will be better done by permitting proceedings to some extent, when he may by special leave continue in one or both, at the court's discretion.[12] If the plaintiff requires further time within which to make his election, he should apply for it to the court by motion upon notice.[13] At the expiration of the time allowed him he

§ 295. [1] Mitford's Pl. (Tyler's ed.) 340; Carlisle v. Cooper, 3 C. E. Green (N. J.), 241; Livingston v. Kane, 3 J. Ch. (N. Y.) 224.

[2] Booth v. Booth, 2 Atk. 343; Dunkley v. Van Buren, 3 J. Ch. (N. Y.) 330.

[3] Barker v. Smark, 3 Beav. 64.

[4] Barker v. Dumaresque, 2 Atk. 119; Anon., 1 Vern. 104; Franklin v. Hersch, 3 Tenn. Ch. 467.

[5] Pieters v. Thompson, G. Cooper, 294.

[6] Mitford's Pl. (Tyler's ed.) 340; Leicester v. Leicester, 10 Sim. 87.

[7] Fisher v. Mee, 3 Meriv. 45; Soule v. Corning, 11 Paige (N. Y.), 412.

[8] Bracken v. Martin, 3 Yerg. (Tenn.) 55; Rogers v. Vosburgh, 4 J. Ch. (N. Y.) 84.

[9] Daniell's Ch. Pr. (2d Am. ed.) 817.

[10] Mouseley v. Basnett, 1 Ves. & B. 382, n.

[11] Mills v. Fry, 3 Ves. & B. 9; Anon., 2 Madd. 395; Daniell's Ch. Pr. 817.

[12] Amory v. Brodrick, Jacob, 530; Carwick v. Young, 2 Swanst. 239.

[13] Daniell's Ch. Pr. (5th Am. ed.) 817.

must make his election, which is usually done by filing a written statement of it signed by him or his solicitor in the clerk's office;[14] or else his bill will be dismissed.[15] If he elect to proceed in equity, his proceedings at law are stayed by the order,[16] and either the defendant will be allowed to recover the costs of the action, or the plaintiff will be directed by the court of equity to pay them.[17] If the plaintiff elect to proceed at law, his bill in equity will be dismissed with costs.[18] Such a dismissal will, however, be no bar to a subsequent suit.[19]

[14] Ibid.

[15] Daniell's Ch. Pr. (5th Am. ed.) 816; Boyd v. Heinzelman, 1 Ves. & B. 381.

[16] Daniell's Ch. Pr. (5th Am. ed.) 816.

[17] Simpson v. Sadd, 16 C. B. 26; Carwick v. Young, 2 Swanst. 239.

[18] Jones v. Earl of Strafford, 3 P. Wms. 79, 90, n. B.

[19] Countess of Plymouth v. Bladon, 2 Vern. 32; Livingston v. Kane, 3 J. Ch. (N. Y.) 224; Rogers v. Vosburgh, 4 J. Ch. (N. Y.) 84.

CHAPTER XXI.

THE HEARING.

§ 296. Bringing a suit to a hearing.— The old practice of bringing a suit to a hearing was the procurement of an order by the plaintiff setting it down for hearing within four weeks after the closing of the evidence. Upon his failure to do this defendant might either set it down himself, or move to dismiss the bill for want of prosecution. The party setting down was obliged to sue out a subpœna to hear judgment, and to have the same served upon the solicitors of the other parties.[1] If a plaintiff wished to set a cause down for a hearing upon bill and answer, he was obliged to do so within the time allowed him for filing the replication.[2] The practice upon this subject in the United States courts is, however, very loose,— some circuits following the analogy of the English practice; some regulating the matter by rule; and some adopting by custom a practice very similar to that of the courts of the State where the circuit is held.[3] Calendar practice in the several circuits is usually modeled on the State practice in that respect. In the Southern District of New York, the rules provide that "Issues, whether of law or fact, and appeals, in this court, may be noticed for trial or hearing, and placed upon the calendar,

§ 296. [1] Daniell's Ch. Pr. (5th Am. ed.) 963–971; 3 Bl. Com. 450.

[2] Daniell's Ch. Pr. (5th Am. ed.) 964, 965.

[3] By statute, a preference is given in all circuits and in the Supreme Court to actions in which a State is a party or in which the execution of the revenue laws of a State is enjoined. U.S.R.S., § 949; Ward v. State, 12 Wall. 163; Hoge v. R. & D. R. Co., 93 U. S. 1; Davenport v. Dows, 15 Wall. 390; Miller v. State, 12 Wall. 159. It has been held: that the defendant may set the case down for a hearing upon the bill and answer after a replication when the time to take testimony has expired, without any testimony being taken and no motions upon the answer are pending. McGorray v. O'Connor (C. C. A.), 87 Fed. R. 586. Thus, where nothing is done for two years after issue joined, the defendant may put the cause on the calendar and enter a decree dismissing the bill, and in such a case leave to discontinue was denied the plaintiff. Welsbach Light Co. v. Mahler, 88 Fed. R. 427.

by either party; and either party noticing the same may, when the cause shall be called, move the trial or hearing, and take verdict or judgment, or order to dismiss the suit for not going to trial, as the court shall direct."[4] "When no proceedings are taken by either party within thirty days after replication, for the examination of witnesses out of court, either party may set the cause down for hearing upon the pleadings."[5] If an original and a cross cause have been set down for hearing at different times, and other causes intervene, the plaintiff in whichever of them is below the other will usually upon motion obtain leave to bring it forward, so that both causes may be heard together.[6] Where one defendant has demurred and another filed a plea, it is the usual practice to postpone the hearing upon the plea until the demurrer has been determined.[7] A hearing will not be given upon an agreed statement of facts without pleadings,[8] even if a State statute authorizes such a practice.[9]

§ 297. Manner of hearing a cause.—The English practice upon the hearing of a cause where all parties appear upon its being called, has been thus described: "The leading counsel for the plaintiff opens the plaintiff's case and in so doing states, first the bill, and then the answers, if any: pointing out the matters in issue, and questions in equity arising therefrom; after which the plaintiff's evidence is read, either by his leading or his junior counsel, and their arguments in support of the case are adduced. The counsel for the defendant are then heard, in support of the defendant's case, and his evidence is read by them; and the plaintiff's senior counsel is then heard in reply. When all are heard, the court pronounces the decree, either immediately or at a subsequent day."[1] It is usual in the United States, to waive the reading, and for counsel to state the substance of the pleadings and testimony, which are submitted to the judge at, or shortly after, the conclusion of the oral arguments, with written arguments upon the law and the

[4] U. S. C. C., S. D. N. Y., Rule of Jan. 14, 1871.

[5] U. S. C. C., S. D. N. Y., Rule 109.

[6] Hinde's Pr. 415; 3 Bl. Com. 451.

[7] Campbell v. Mayor of New York, 33 Fed. R. 795.

[8] Nickerson v. A., T. & S. F. R. Co., 30 Fed. R. 85; s. c., 1 McCrary, 383.

[9] Nickerson v. A., T. & S. F. R. Co., 30 Fed. R. 85; s. c., 1 McCrary, 383; *supra*, § 6.

§ 297. [1] Daniell's Ch. Pr. (5th Am. ed.) 1088.

facts, called briefs or points. The course is much the same where the cause is set down for a hearing upon bill and answer. The pleadings only are then read, and the answer is admitted to be true in all its material allegations of fact,[2] although not responsive to the bill,[3] even when not stated positively, and the defendant only avers that he believes and hopes to be able to prove such facts.[4] But the plaintiff does not thereby admit conclusions of law, nor allegations as to matters concerning which the court takes judicial notice.[5] No other evidence is then permitted except matters of record to which the answer refers.[6] Unless relevant to some issue, it is not necessary to produce the mortgage bonds upon the hearing of a foreclosure suit.[7] It has been said that a judge may hear a cause in which he was retained before he received his judicial appointment;[8] but the almost universal practice is for a judge to refuse to sit in such a case.

§ 298. Rules of decision upon a hearing.—All decisions made in a former stage of the cause are open for review upon the final hearing.[1] But if the evidence is unchanged, a judge will rarely refuse to follow a ruling made by one of his colleagues in the same[2] or a similar[3] case. Greater respect is paid to a ruling by the Circuit Justice than to one by a Circuit Judge;[4] and a ruling by a Circuit Judge has more weight than one by a District Judge. In matters of substantive as distin-

[2] Lake E. & W. R. Co. v. Indianapolis Nat. Bank, 65 Fed. R. 690; Parker v. Concord, 39 Fed. R. 718.

[3] Lake E. & W. R. Co. v. Indianapolis Nat. Bank, 65 Fed. R. 690.

[4] Brinckerhoff v. Brown, 7 J. Ch. (N. Y.) 217; Dale v. McEvers, 2 Cow. (N. Y.) 118.

[5] Taylor v. Barclay, 2 Sim. 213. See *supra*, § 106.

[6] Anon., 1 Barb. Ch. (N. Y.) 78.

[7] Dickerman v. Northern Tr. Co., 176 U. S. 181; Northern Tr. Co. v. Columbia S. P. Co., 75 Fed. R. 936; Toler v. East Tenn., V. & G. Ry. Co., 67 Fed. R. 168, 181.

[8] Thelusson v. Rendlesham, 7 H. L. C. 429; The Richmond, 9 Fed. R. 863, and citations. It was held that a district judge is not disqualified from trying the validity of bonds issued by a county in which he is a resident and taxpayer. Wade v. Travis County, 73 Fed. R. 985.

§ 298. [1] Fourniquet v. Perkins, 16 How. 82; Pulliam v. Pulliam, 10 Fed. R. 53. But see Coupe v. Weatherhead, 87 Fed. R. 16.

[2] Cole S. M. Co. v. Va. & G. H. W. Co., 1 Saw. 685; Wakelee v. Davis, 44 Fed. R. 532.

[3] Worswick Mfg. Co. v. Philadelphia, 30 Fed. R. 625. But see N. P. R. Co. v. Sanders, 47 Fed. R. 504.

[4] Preston v. Walsh, 10 Fed. R. 315. But see U. S. v. Huggell, 40 Fed. R. 636, 644.

guished from adjective law, that is, of the law creating rights but not of that merely regulating practice, the Federal courts are — certainly so far as property in land is affected thereby, and probably altogether — bound by and will follow the statutes of the State within whose jurisdiction is the property that is the subject of the suit.[5] A State statute, however, which is merely declaratory of the law cannot affect the rules applying to causes of action that arose before its enactment.[6] Whether a State statute has been properly passed so as to take effect is a question of law, in determining which the courts of the United States will follow the decisions in the State wherein it is claimed to be in force.[7] So, too, in construing a statute or the Constitution of a State, the Federal courts will in general follow the construction put upon it by the State courts, "when that construction has been settled by the decisions of its highest tribunal."[8] Even if, before the State courts have construed it, a State statute is given one construction by a Federal court, and subsequently the highest court of the State construes it differently; or if the Federal court have first construed it in ignorance of its construction by the highest tribunal of the State,— the Federal courts will, in subsequent cases, disregard their former ruling and follow that of the State court.[9] It has even been held that the Federal courts will not investigate the claim that the decision of the State court was obtained by collusion between the parties to the case in which it was ob-

[5] Watts v. Waddle, 6 Pet. 389; McGoon v. Scales, 9 Wall. 23; Gaines v. Fuentes, 92 U. S. 10; Brine v. Insurance Co., 96 U. S. 627; Pulliam v. Pulliam, 10 Fed. R. 53, 77. See *infra*, § 375.

[6] Koshkonong v. Burton, 104 U. S. 668.

[7] South Ottawa v. Perkins, 94 U. S. 260; Post v. Supervisors, 105 U. S. 667; Leeper v. Texas, 139 U. S. 462.

[8] Polk's Lessee v. Wendal, 7 Cranch, 87; Nesmith v. Sheldon, 7 How. 812; Walker v. State H. Com'rs, 17 Wall. 648; Elmwood v. Marcy, 92 U. S. 289; East Oakland v. Skinner, 94 U. S. 255; Louisville, N. O. & T. Ry. Co. v. Mississippi, 133 U. S. 587; Peters v. Bain, 133 U. S. 670; Case v. Kelly, 133 U. S. 21. Where it was claimed that the decision of such a question was pending before the State Supreme Court, a motion for an adjournment until that court had made its decision was denied. Detroit v. Detroit City Ry. Co., 55 Fed. R. 569.

[9] Fairfield v. County of Gallatin, 100 U. S. 47. A decree will be reversed on this ground when the decision of the State court was rendered pending the appeal. Stutsman County v. Wallace, 142 U. S. 293. But see Burgess v. Seligman, 107 U. S. 20; and *infra*, § 375.

tained.[10] The courts of the United States are not bound by a decision of a State court construing a statute which is claimed to be a contract by the State; since otherwise the clause in the national Constitution forbidding a State to pass a law impairing the obligations of contracts might be violated with impunity.[11] For a similar reason, if different constructions have been given to the same statute or constitutional provision by the courts of a State at different times, the Federal courts are not "bound to follow the later decisions, if thereby contract rights which have accrued under earlier rulings will be injuriously affected."[12] Otherwise, said Chief Justice Taney, "the provision of the Constitution of the United States, which secures to the citizens of another State the right to sue in the courts of the United States, might become utterly useless and nugatory."[13] It seems that the Federal courts will give to a right created by a well-recognized local custom established and acquiesced in within a State, the same force as if it had been created by a State statute.[14] In deciding questions of general commercial law, however, upon which the statutes of a State are silent, the Federal courts are not bound by the decisions of the State courts, but decide according to their own views of what the law is and should be.[15]

§ 299. Objections which cannot be made at the hearing.— As the provisions of the equity rules and the other regulations

[10] East Oakland v. Skinner, 94 U. S. 255.

[11] Jefferson Branch Bank v. Skelly, 1 Black, 436. See Railroad Co. v. Falconer, 103 U. S. 821, 822.

[12] Waite, C. J., in Douglass v. County of Pike, 101 U. S. 677, 686. See also Rowan v. Runnels, 5 How. 134; Ohio L. Ins. & Tr. Co. v. Debolt, 16 How. 416; Gelpcke v. Dubuque, 1 Wall. 175; Thompson v. Perrine, 103 U. S. 806.

[13] Rowan v. Runnels, 5 How. 134.

[14] Swift v. Tyson, 16 Pet. 1, 18; Gaines v. Fuentes, 92 U. S. 10; Railroad Co. v. National Bank, 102 U. S. 14, 29. See *supra*, § 7.

[15] Swift v. Tyson, 16 Pet. 1; Carpenter v. Providence-Washington Ins. Co., 16 Pet. 495; Oates v. National Bank, 100 U. S. 239; Railroad Co. v. National Bank, 102 U. S. 14; Butler v. Douglass, 3 Fed. R. 612. See Burgess v. Seligman, 107 U. S. 20. See *infra*, § 375. A plea of *res adjudicata* by a decision of a State court between the same parties or their privies is valid, although the question there decided arose on demurrer and was a question of general commercial law and equity jurisprudence. Fuller v. Hamilton County, 53 Fed. R. 411. In one case, where the rule of the Federal was different from that of the State courts, Judge McCrary followed the latter, since otherwise there was a probability that a party to the suit would be subjected to a double payment. Sonstiby v. Keeley, 7 Fed. R. 447.

of practice are chiefly designed to facilitate the speedy and orderly progress of a cause to a hearing, after a cause has been brought to a hearing it is a general rule that no objections as to form or the delay in taking a previous proceeding will be allowed to be taken then for the first time.[1] Thus, the rules provide that "if a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having by plea or answer taken the objection, and therein specified by name or description the parties to whom the objection applies, the court (if it shall think fit) shall be at liberty to make a decree saving the rights of the absent parties."[2] "Where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the clerk's order-book in the form or to the effect following, (that is to say): 'Set down upon the defendant's objection for want of parties.' And where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order for liberty to amend his bill by adding parties. But the court, if it thinks fit, shall be at liberty to dismiss the bill."[3] An amended bill filed without leave upon the day of the hearing may be disregarded by the court.[4] It seems that a plea stating a mere conclusion of law or a plea unaccompanied by the proper certificate of counsel and affidavit of the defendant, may also be disregarded.[5] Advantage may, however, be taken of the laches of the plaintiff by a defendant who has not pleaded it.[6] The objection that the allegations in the bill show no ground for the interference of a court of equity may be taken at any time.[7] The objection that the plaintiff has an adequate remedy at law is waived by the de-

§ 299. [1] Allen v. Mayor, etc. of N. Y., 18 Blatchf. 239.

[2] Rule 58.

[3] Rule 52.

[4] Terry v. McLure, 103 U. S. 442.

[5] National Bank v. Insurance Co., 104 U. S. 54.

[6] Baker v. Biddle, 1 Bald. 394.

[7] Baker v. Biddle, Bald. 394; Quirolo v. Ardito, 1 Fed. R. 610.

fendant unless raised in a demurrer, plea, or answer; but it may be taken by the court at any time.[8]

§ 300. Action of the court upon a hearing.— The court may upon the hearing of a cause either decide all the questions raised therein and make a final decree, or merely dispose of some of them and give directions to facilitate the decision of those which remain. If the court inclines in favor of the defendant, it will usually render a final decree dismissing the bill. The dismissal may be absolute or without prejudice. An absolute decree of dismissal is an absolute bar to any subsequent suit brought for the same cause.[1] A dismissal without prejudice is no bar to another suit brought for the same cause of action, provided that the defects on account of which the bill was dismissed are remedied.[2] A dismissal without prejudice is usually ordered when a bill is dismissed for want of parties,[3] or for want of jurisdiction in a Federal court,[4] or for multifariousness,[5] or for "a slip or mistake in the pleadings or in the proof."[6] The Supreme Court will reverse a decree which dismissed a bill absolutely when the dismissal should have been without prejudice.[7] Where the dismissal is because the plaintiff has an adequate remedy at law, the decree should state that it is without prejudice to a suit at law.[8] If, on the other hand, the court inclines in favor of the plaintiff, unless the bill pray merely for a perpetual injunction, it rarely renders a final decree at the first hearing of the cause. It often directs a refer-

[8] Reynes v. Dumont, 130 U. S. 352; Kilburn v. Sunderland, 130 U. S. 505. See *supra*, § 110.

§ 300. [1] Case v. Beauregard, 101 U. S. 688; Durant v. Essex Co., 7 Wall. 107.

[2] Walden v. Bodley, 14 Pet. 156, 161; Daniell's Ch. Pr. (5th Am. ed.) 994, 995; Rosse v. Rust, 4 J. Ch. (N. Y.) 300.

[3] Kendig v. Dean, 97 U. S. 423.

[4] Hartell v. Tilgham, 99 U. S. 547; Gaylords v. Kelshaw, 1 Wall. 81; Hollins v Brierfeld C. & T. Co., 150 U. S. 371.

[5] Williams v. Jackson, 107 U. S. 478, 484.

[6] Daniell's Ch. Pr. (2d Am. ed.) 994, 995; M'Neill v. Cahill, 2 Bligh, 228; Woollam v. Hearn, 7 Ves. 211, 223; Rosse v. Rust, 4 J. Ch. (N. Y.) 300. For example, when the bill showed a good ground of equitable relief as to one plaintiff, but failed to show what interest the other had in the subject-matter of the litigation. House v. Mullen, 22 Wall. 42. But see Ogsbury v. La Farge, 2 N. Y. 113; and § 291.

[7] House v. Mullen, 22 Wall. 42; Texas & P. Ry. Co. v. Interstate Tr. Co., 155 U. S. 585; Fougere v. Jones, 66 Fed. R. 316.

[8] Sanders v. Devereux (C. C. A.), 60 Fed. R. 311, 316.

ence to a master to take accounts or assess damages;[9] and it not infrequently gives leave to either party to apply for further orders or directions "at the foot of the decree" which it orders entered.[10] Upon such a clause the court will usually listen to no further applications, except as to matters concerning which directions were contained in the decree first entered. Thus, it has been held that it will not under such a clause entertain an application to set aside a sale made under a decree.[11] If the court is in doubt concerning the facts, it may direct a feigned issue, or an action at law, or a reference to a master, to aid it in determining the same. In one case, when a bill had been filed by a bondholder praying for the appointment of a receiver of a canal company, the court at the hearing denied the application for a receiver, but retained the bill so far as to compel the corporation to file an annual account.[12]

[9] See ch. XXIII.

[10] Legrand v. Whitehead, 1 Russ. 309; Wetmore v. St. Paul & P. R. Co., 8 Fed. R. 177. But see Hughes v. Jones, 8 De G., F. & J. 307.

[11] Wetmore v. St. Paul & P. R. Co., 8 Fed. R. 177; *infra*, ch. XXVII.

[12] Stewart v. C. & O. C. Co., 5 Fed. R. 149.

CHAPTER XXII.

ISSUES AT LAW.

§ 301. Power of courts to direct issues at law.— When the chancellor was in doubt concerning any question of fact arising in the cause, the evidence in regard to which was conflicting or insufficient,[1] it was his custom to compel its trial before a jury upon a feigned issue; and, if their verdict was satisfactory to him, to assume the truth of the facts established by the same as the basis of his decree.[2] This power of the chancellor is also vested, independently of any special statute, in all the courts of the United States which have equitable jurisdiction;[3] but in cases arising under the patent laws it has been increased by a statute providing that the Circuit Courts of the United States, "when sitting in equity for the trial of patent causes, may impanel a jury of not less than five and not more than twelve persons, subject to such general rules in the premises as may from time to time be made by the Supreme Court,[4] and submit to them such questions of fact arising in such cause as such circuit court shall deem expedient; and the verdict of such jury shall be treated and proceeded upon in the same manner and with the same effect as in the case of issues sent from chancery to a court of law and returned with such findings."[5] The court may at any time decide a cause without a trial of an issue which it has ordered, and even without revoking its previous order directing one.[6] The order of a judge directing an issue at law is discretionary, and it is doubtful whether or not it may be reviewed upon appeal.[7] It

§ 301. [1] Moons v. De Bernales, 1 Russ. 301; Burkett v. Randall, 3 Mer. 466.

[2] 3 Bl. Com. 452.

[3] Harding v. Handy, 11 Wheat. 103; Goodyear v. Providence R. Co., 2 Cliff. 351; Johnson v. Harmon, 94 U. S. 371, 378.

[4] No rules upon this subject have hitherto been made.

[5] 18 St. at L., ch. 77, p. 315; 1 Supp. U. S. R. S. 136; Watt v. Starke, 101 U. S. 247.

[6] Field v. Holland, 6 Cranch, 8; Cook v. Bay, 4 How. (Miss.) 485.

[7] See Black v. Lamb, 1 Beasley (N. J.), 108; Ward v. Hill, 4 Gray (Mass.), 593; Crittenden v. Field, 8 Gray (Mass.), 621.

was formerly an almost invariable custom to direct an issue when the question to be determined was the validity of a will as against an heir, or the true heir-at-law of a decedent, or the right of a rector to tithes.[8] It is very common, moreover, when an allegation in a sworn answer, the plaintiff not having waived answer under oath, was only controverted by the testimony of a single witness supported by corroborating circumstances;[9] or when, by determining in the way he inclined, the judge would find a person guilty of forgery.[10] It seems to be the opinion of Judge Hammond that it is the duty of a Federal court of equity to direct an issue at law of a common-law claim against a receiver.[11] An issue may be directed notwithstanding a report of auditors upon the facts.[12] The court sometimes directs only a single issue, and sometimes several, according to the number of substantial points upon which it deems it necessary to take the opinion of a jury; and it will, when the question to be decided embraces several disputed circumstances, direct an issue upon each of them.[13] If the parties cannot agree upon the form of an issue, it will be settled either by the judge or by a master, as the court deems most expedient.[14] By going to trial upon an issue neither party is precluded from any right he may afterwards have to appeal from the order directing it.[15]

§ 302. **Matters concerning which an issue is directed.**— No party will be permitted to take an issue in a different form from that which he has stated in his pleadings;[1] but the court may upon its own motion direct an issue to try a matter not in issue arising upon the hearing, and which it thinks should be determined before a final decree is rendered.[2] An issue also may be directed upon claims brought in under a decree by

[8] 3 Bl. Com. 452; Lord Fingal v. Blake, 1 Molloy, 118; Vaigneur v. Kirk, 2 Desaus. (S. C.) 640; Williams v. Price, 4 Price, 156, 160.

[9] Daniell's Ch. Pr., ch. xxvi, § 1.

[10] Bishop of Winchester v. Fournier, 2 Ves. Sen. 445, 446; Apthorp v. Comstock, 2 Paige (N. Y.), 482. But see Peake v. Highfield, 1 Russ. 559.

[11] Atkyn v. Wabash Ry. Co., 41 Fed. R. 193; *supra*, § 251.

[12] Field v. Holland, 6 Cranch, 8.

[13] Bryan v. Parker, 1 Y. & C. 170; Bailey v. Sewell, 1 Russ. 239; Earl of Newburgh v. Countess, 5 Madd. 364.

[14] Daniell's Ch. Pr., ch. xxvi, § 1.

[15] White v. Lisle, 3 Swanst. 342; Legare v. Daly, 1 Ves. Sen. 192; De Tastet v. Bordenave, Jacob, 516.

§ 302. [1] St. Paul's v. Kettle, 2 V. & B. 1; Bennett v. Neale, Wightw. 324; Savage v. Carroll, 1 Ball & B. 548.

[2] Balch v. Tucker, 2 Ch. Cas. 40.

persons not upon the record.[3] An issue will not, however, be directed to establish a point which a party set up in his pleading but omitted in his proof.[4]

§ 303. Time when an issue is directed.— According to the old practice an issue was rarely directed before the original hearing of a cause.[1] Instances have occurred, however, when this has been done before that time upon motion,[2] and even to determine the facts upon a motion for an injunction or a receiver, when the affidavits for or against the motion were conflicting.[3] An issue has been often granted after the original hearing at a hearing for further directions;[4] and even afterwards.[5] It has been said that, in the Federal courts, an order for an issue should not be made until all the proofs have been taken and publication has passed.[6] Under the statute providing for the direction of issues in patent causes, it would seem that one can now be directed by an interlocutory order more frequently than formerly.[7]

§ 304. Manner of trying an issue.— The manner of trying a feigned issue is thus described by Blackstone; "But, as no jury can be summoned to attend this court, the fact is usually directed to be tried at the bar of the court of King's bench, or at the assizes upon a *feigned issue*. For (in order to bring it there, and have the point in dispute, and that only, put in issue) an action is brought, wherein the plaintiff, by a fiction, declares that he laid a wager of 5*l*. with the defendant that A was heir-at-law to B; and then avers that he is so; and therefore demands the 5*l*. The defendant admits the feigned wager, but avers that A is not the heir to B, and thereupon that issue is joined, which is directed out of chancery to be tried; and thus the verdict of the juror at law determines the fact in the court of equity. These feigned issues seem borrowed from the

[3] Price v. Price, cited in 2 Smith's Ch. Pr. 76.

[4] Savage v. Carroll, 1 Ball & B. 548; Price v. Berrington, 3 Macn. & G. 486.

§ 303. [1] Fullagar v. Clark, 18 Ves. 481.

[2] Middleton v. Sherburne, 4 Y. & C. 358; Kent v. Burgess, 11 Sim. 361; Townley v. Deare, 3 Beav. 213; Lancashire v. Lancashire, 9 Beav. 259.

[3] Gardiner v. Rowe, 4 Madd. 236; De Tastet v. Bordenave, Jacob, 516.

[4] New Orleans G. L. & B. Co. v. Dudley, 8 Paige (N. Y.), 452.

[5] Price v. Price, cited in 2 Smith's Ch. Pr. 76.

[6] Goodyear v. Providence R. Co., 2 Fish. Pat. Cas. 499.

[7] 18 St. at L., ch. 77, p. 315; 1 Supp. U. S. R. S. 186.

sponsio judicialis of the Romans: and are also frequently used in the courts of law, by consent of the parties, to determine some disputed right without the formality of pleading, and thereby to save much time and expense in the decision of a cause."[1] The legal fiction is, however, now practically out of use; and issues are tried upon the common-law side of a Circuit or District Court frequently by the same judge that directed them.[2] The course of proceeding upon the trial of an issue is substantially the same as that in ordinary trials at common law, unless the judge who directed it has given special directions upon the subject.[3] When, however, a will was sought to be proved against an heir-at-law, at the suit of a devisee, it was necessary by the former practice to prove the execution of the will by examining all the witnesses who were alive and capable of giving testimony.[4] If the order for an issue direct that a number of witnesses be examined, but the plaintiff declines to call some, the judge himself will call and examine the rest.[5] It seems, too, that the jury should be sworn in the words of the order of issue.[6] The order of issue, however, usually contains directions as to admissions to be made and documents to be produced by the parties.[7] No admission of any fact not clearly admitted by the pleadings will, however, be required.[8] If such directions are omitted in the order for the issue, they may be obtained afterwards upon motion.[9] The party upon whom the burden of proof rests, whether he be plaintiff or defendant in the original suit, is directed by the order to act as plaintiff in the issue.[10] It is the defendant's duty to name an attorney to appear for him at the trial of the issue. If he fail to do so, it has been held that an order may be obtained directing that he name an attorney in four days, or else that the issue be taken as tried and a verdict given for

§ 304. [1] 3 Bl. Com. 452.

[2] See Wilson v. Riddle, 123 U. S. 608.

[3] See Kerr v. South Park Com'rs, 117 U. S. 379; Wilson v. Riddle, 123 U. S. 608.

[4] Townsend v. Ives, 1 Wilson, 216; Ogle v. Cook, 1 Ves. Sen. 177; Bullen v. Michel, 2 Price, 399; Bootle v. Blundell, 19 Ves. 494.

[5] Groom v. Chambers, 2 Mont. & Ayr. 742.

[6] Wilson v. Barnum, 1 Wall. Jr. 342.

[7] Duke of Beaufort v. Morris, 2 Phil. 688; Apthorp v. Comstock, 2 Paige (N. Y.), 482; Cart v. Hodgkin, 3 Swanst. 161.

[8] Duke of Beaufort v. Morris, 2 Phil. 688.

[9] Marsh v. Sibbald, 2 V. & B. 375.

[10] Parker v. Morrell, 2 Phil. 453.

the plaintiff.[11] The decree or order for the issue should specify a time when it is to be tried.[12] If the plaintiff make default in having the case ready for trial at the appointed time,[13] or either party fail then to appear, the court will order the issue taken *pro confesso* against him, unless he can show a reasonable ground for a postponement.[14] It seems that an application for a postponement,[15] or for a special jury, if one be desired,[16] should be made to the judge who directed the issue. A person interested in the result of an issue, but who refuses to be a party to it, may be allowed to attend the trial by counsel, in which case he may be compelled to produce documents material to the case and in his possession.[17] After the trial, the trial judge certifies how the verdict was found, but judgment should not be entered upon it.[18] If any special circumstances have occurred at the trial which he thinks it right to report to the court, he indorses the *postea*.[19] He may also furnish to the court of equity a description of the trial.[20] An irregularity or omission in this respect may, however, be corrected or disregarded.[21]

§ 305. Effect of the finding of a jury upon an issue.—"The verdict of a jury upon an issue out of chancery is only advisory and never conclusive upon the court. It is intended to inform the conscience of the Chancellor. It may be disregarded, and a decree rendered contrary to it."[1] If, therefore, either party be dissatisfied, he must move for a new trial on the equity and not on the common-law side of the court;[2] "and for that purpose the party applying for a new trial must procure notes of the proceedings and of the evidence given at the trial for the

[11] Wilson v. Ginger, 2 Dick. 521; Hartland v. Dancocks, 5 De G. & Sm. 561.

[12] Daniell's Ch. Pr., ch. xxvi, § 1.

[13] Bearblock v. Tyler, 1 J. & W. 225; Casborne v. Barsham, 5 M. & C. 113.

[14] Casborne v. Barsham, 5 M. & C. 113; Hargrave v. Hargrave, 8 Beav. 289.

[15] Kebel v. Philpot, 9 Sim. 614.

[16] Anon., 2 P. Wms. 68. As to depositions, see Cahoon v. Ring, 1 Cliff. 592.

[17] Pindar v. Smith, Mad. & Geld. 48.

[18] Kerr v. S. Park Com'rs, 117 U. S. 379.

[19] White v. Lisle, 3 Swanst. 343; Trenton B. Co. v. Russell, 1 Green, Ch. (N. J.) 492.

[20] Bassett v. Johnson, 1 Green, Ch. (N. J.) 154.

[21] Wilson v. Riddle, 123 U. S. 608.

§ 305. [1] Bradley, J., in Watt v. Starke, 101 U. S. 247, 252. See also Basey v. Gallagher, 20 Wall. 670; Allen v. Blunt, 3 Story, 742, 746.

[2] Watt v. Starke, 101 U. S. 247, 250; Johnson v. Harmon, 94 U. S. 371, 378.

use of the Chancellor. This is done either by moving the Chancellor to send to the judge who tried the issue, for his notes of trial; or procuring a statement of the same in some other proper way. The Chancellor then has before him the evidence given to the jury, and the proceedings at the trial, and may be satisfied, by an examination thereof, that the verdict ought not to be disturbed. The evidence and proceedings then become a part of the record, and go up to the court of appeal if an appeal is taken."[3] Unless such a motion is made, no error committed in the course of the trial of the issue can be reviewed upon appeal.[4] Such an application should be made by motion or petition before the cause comes on for hearing upon further directions.[5] The form of an issue cannot, however, be changed in this manner. A party desiring to alter it must do so by presenting a petition for a rehearing of the decree or order directing it.[6] The manner in which the verdict is reviewed in equity is thus described by Lord Eldon: "In considering whether, in such a case as this, the verdict ought to be disturbed by a new trial, allow me to say that this court, in granting or refusing new trials, proceeds upon very different principles from those of a court of law. Issues are directed to satisfy the judge, which judge is supposed, after he is in possession of all that passed upon the trial, to know all that passed there; and looking at the depositions in the cause, and the proceedings both here and at law, he is to see whether, on the whole, they do or do not satisfy him. It has been ruled over and over again, that if, on the trial of an issue, a judge reject evidence which ought to have been received, or receive evidence which ought to have been refused, though in that case a court of law would grant a new trial, yet if this court is satisfied, that if the evidence improperly received had been rejected, or the evidence improperly rejected had been received, the verdict ought not to have been different, it will not grant a new trial merely upon such grounds."[7] The usual grounds for di-

[3] Bradley, J., in Watt v. Starke, 101 U. S. 247, 250, 251. See also Johnson v. Harmon, 94 U. S. 371.

[4] Brockett v. Brockett, 3 How. 691; Johnson v. Harmon, 94 U. S. 371; Watt v. Starke, 101 U. S. 247.

[5] Atty. Gen. v. Montgomery, 2 Atk. 378; Van Alst v. Hunter, 5 J. Ch. (N. Y.) 148, 152.

[6] Daniell's Ch. Pr. (3d Am. ed.) 1114.

[7] Lord Eldon in Barker v. Ray, 2 Russ. 63. See also Bootle v. Blundell,

recting a new trial of an issue are, "1st, the alleged improper summing up of the judge; 2dly, because the weight of evidence is against the verdict; and 3dly, because of an informality in the evidence."[8] Surprise and fraud are also reasons for granting a new trial.[9] When the dispute concerns the title to land, in imitation of courts of law two trials of the issue have often been granted, when the first verdict was satisfactory upon the evidence;[10] and sometimes the court has directed a second trial for the solemn determination of the matter, without setting aside the first verdict, the effect of which was that the first verdict was admitted in evidence upon the second trial, and had its weight with the jury.[11] In such case, the court usually made it a condition of granting a second trial, that the applicant should pay to the other party the costs of the first.[12]

§ 306. Proceedings after the trial of an issue.— After the trial of an issue and the completion of the record by the addition of the *postea*, the cause, unless a new trial is obtained, should be set down for hearing.[1] This may be done in the usual manner; but it seems, not before the expiration of the first four days of the term following the trial, in order that the party against whom the verdict has been found may have an opportunity of moving for a new trial.[2] The cause then comes on in the regular course, when such final or other decree as is proper is pronounced. The costs of an issue do not follow the verdict as a matter of course, but are in the discretion of the court which directed the issue;[3] though they are usually given to the party in whose favor the verdict was rendered.[4] In one case the court ordered an advance out of a fund in its possession, in order to enable the parties to try an issue directed by it.[5]

19 Ves. 494; Tatham v. Wright, 2 Russ. & M. 1; Watt v. Starke, 101 U. S. 247, 252.

[8] Smith's Ch. Pr. (Phila. ed.), vol. ii, p. 84. See also Tatham v. Wright, 2 Russ. & M. 1; Watt v. Starke, 101 U. S. 247, 253.

[9] Exton v. Turner, 2 Ch. Cas. 80; Standen v. Edwards, 1 Ves. Jr. 133.

[10] Earl of Darlington v. Bowes, 1 Eden, 271; Stace v. Mabbot, 2 Ves. Sen. 552.

[11] Baker v. Hart, 3 Atk. 542.

[12] Baker v. Hart, 3 Atk. 542; Edwin v. Thomas, 1 Vern. 489.

§ 306. [1] Allen v. Blunt, 3 Story, 742; Daniell's Ch. Pr., ch. xxvi.

[2] 1 Newland's Ch. Pr. 357.

[3] Decker v. Caskey, 2 Green Ch. (N. J.) 446.

[4] Corporation of Rochester v. Lee, 2 De G., M. & G. 427.

[5] Coombs v. Brooks, 3 De G. & S. 452.

CHAPTER XXIII.

PROCEEDINGS IN A MASTER'S OFFICE.

§ 307. References to masters in general.— The labors of a judge of a court of equity are often materially lightened by referring the consideration of matters of fact to a master in chancery, who is directed by it to investigate the same and report his opinion thereon to the court. Certain ministerial acts which a court of equity undertakes are also performed by it through a master. The matters which are ordinarily referred to masters in chancery are inquiries, as to whether pleadings or other proceedings in a suit in equity contain impertinence or scandal; as to who are the heirs, next of kin, creditors, or members of a particular class of legatees of a person whose estate is in the hands of the court for distribution; as to whether the title to real estate is good; as to the state of the law of a foreign country; as to whether one of two books or other publications is pirated from the other; as to the amount of damage suffered by the granting or withholding of an injunction; the taking of accounts; the computation of interest; the settlement of conveyances, and other deeds; the selling of property; the appointment of trustees, receivers, and guardians; and the superintendence of the performance of their duties by receivers. The decision of the case or of the issues joined by the bill, answer and replication cannot be referred to a master except by consent.[1] The extent of a master's authority is limited by the decree or order appointing him;[2] and it has been said that it cannot be extended even by consent.[3] The rules provide that "every decree for an account of the personal estate of a testator or intestate shall contain a direction to the master to whom it is referred to take the same to inquire and state to the court what parts, if any, of such personal estate are outstanding un-

§ 307. [1] Kimberley v. Arms, 129 U.S. 512, 523, 524; Morris v. Taylor, 23 N. J. Eq. 131.

[2] Lonsdale Co. v. Moies, 2 Cliff. 538.

[3] Farmers' L. & Tr. Co. v. Central R. Co. of Iowa, 2 Fed. R. 656; Gordon v. Hobart, 2 Story, 243.

disposed of, unless the court shall otherwise direct."[4] Where no objection to the language of an order of reference was made for several years, and in the meanwhile one of the parties had died, the Circuit Court of Appeals refused to modify it on an appeal from the final decree.[5] The order appointing a standing master need not be recorded in any book; nor need he be required to file a book.[6]

§ 308. **Who may be appointed master.**—The Circuit Courts, "both the judges concurring in the appointment," have the power to appoint standing masters in chancery in their respective districts.[1] A Circuit Court may also appoint a master *pro hac vice* in any particular case.[2] A statute provides that "no clerk of the District or Circuit Courts of the United States, or their deputies, shall be appointed a receiver or master in any case, except where a judge of said court shall determine that special reasons exist therefor, to be assigned in the order of appointment."[3] Another statute provides that "no person related to any justice or judge of any court of the United States by affinity or consanguinity, within the degree of first cousin, shall hereafter be appointed by such court or judge to be employed by such court or judge in any office or duty in any court of which such justice or judge may be a member."[4]

[4] Rule 78.

[5] Gunn v. Black, 60 Fed. R. 151.

[6] Seaman v. N. W. Mut. L. I. Co., 86 Fed. R. 493.

§ 308. [1] Rule 82.

[2] Rule 82.

[3] 20 St. at L., ch. 188, p. 415. It has been held that this prohibition is for the benefit of the parties to the litigation, and may be waived by their consent to an order appointing such an officer master in a particular case; that after such an order or decree has thus been entered and the parties have proceeded before the master, it may be amended by the insertion of a clause stating that the court has determined "that such consent is a sufficient special reason for such appointment," Fischer v. Hayes, 22 Fed. R. 92, and that an order which omits the assignment of any reason for the clerk's appointment is irregular but not void, and cannot be questioned in a collateral proceeding, as by exceptions to his report of a sale, or by a motion to set aside an appraisal by him. N. W. Mut. L. I. Co. v. Seaman, 80 Fed. R. 357; s. c. in C. C. A., Seaman v. N. W. Mut. L. I. Co., 86 Fed. R. 493.

[4] 24 St. at L., p. 552, ch. 373, § 7. A final decree entered upon the report of a master whose appointment was forbidden by this statute is not void, and cannot be set aside upon motion at a subsequent term. Farmers' L. & Tr. Co. v. Iowa Water Co., 80 Fed. R. 467. Whether the statute forbids the appointment of a man who has married a sister of the judge's wife is an open question. Farmers' L. & Tr. Co. v. Iowa Water Co., 80 Fed. R. 467, 469.

§ 309. Bringing on a reference.— The rules provide that, whenever a reference is made, the party at whose instance or for whose benefit it was directed must bring the same to a hearing on or before the rule-day next succeeding the date of the order for a reference.[1] Otherwise the adverse party may forthwith cause proceedings to be had before the master at the costs of the party who procured the reference.[2] The master need not report evidence unless required by either party.[3] It is the master's duty, as soon as he reasonably can after the matter referred to him is brought before him, to assign a time and place for proceeding, and to give due notice thereof to each of the parties, or their solicitors.[4] Notice may be served by mail or otherwise.[5] It need not be served by the marshal.[6] By the old English practice parties interested in the subject-matter of a reference were brought before the court by the service of a warrant. This was a memorandum, upon a slip of paper entitled in the cause, and signed by the master, appointing a day and hour for all parties concerned to attend him on the matter of the reference.[7] It was in substantially the following form: "By virtue of an order of reference, I do appoint to consider the matters thereby to me referred, on —— next, at —— of the clock, in the ——noon, at my Chambers in ——, at which time and place all parties concerned are to attend. [Signature.] Dated the —— day of ——, ——."[8] It is a better practice, however, for the warrant to contain a statement of the nature of the reference.[9] This warrant is often called a "summons."[10] There was required to be at least one clear day between the day of issuing the warrant and the day appointed by it for the attendance of the parties thereon.[11] The warrant was obtained from the master's clerk by the solicitor applying for it; and the latter underwrote a memorandum expressing its object, and saw that due service of it was made.[12] Whenever a docu-

§ 309. [1] Rule 74.
[2] Rule 74.
[3] Union S. R. v. Mathiesson, 3 Cliff. 146, 149. See Kerosene L. H. Co. v. Fisher, 1 Fed. R. 91.
[4] Rule 75.
[5] Kerosene L. H. Co. v. Fisher, 1 Fed. R. 91.
[6] Ibid.
[7] Daniell's Ch. Pr., ch. xxvi.
[8] Ibid.
[9] Manhattan Co. v. Evertson, 4 Paige (N. Y.), 276.
[10] Ibid.
[11] 1 Newland's Ch. Pr. 324. See Bernie v. Vandever, 16 Ark. 616.
[12] Daniell's Ch. Pr., ch. xxvi.

ment of any kind was left at the master's office by the solicitor of either of the parties, he usually took out a warrant, which he underwrote, "on leaving the," etc.[13] This was termed a "warrant on leaving," and was served in the usual manner, but was considered a mere formal notice, to afford the opposite party an opportunity of obtaining a copy of the document left that he might either admit or contest the circumstances there stated, as he might be advised.[14]

§ 310. Parties entitled to attend a reference before a master.— The general rule appears to be, that all parties beneficially interested, either in the estate or in the fund or matter in question, are entitled to attend before the master on all those proceedings which may affect their interests, or increase or diminish their proportion in the fund.[1] The only exception to this rule is said to be the case of a reference to a master of the title to an estate purchased under a decree, when the vendor's solicitor only has the right to appear before the master on the inquiry.[2] An executor, as the legal representative of his testator, is entitled to attend on all proceedings relating to the charges of creditors seeking payment out of the personal estate; but after there has been a report of debts, if all the persons interested in the personal estate are before the court, the executor is only entitled to attend on those proceedings in which he is personally interested as an accounting party.[3] Trustees were formerly not allowed (except in proceedings carried on by themselves) to attend before the master in cases where all the beneficiaries were before the court; but if there were any persons *in esse*, or who might "come into *esse*," who might become interested and whose interests were only represented by the trustees, and were not too remote, the trustees were entitled to attend the proceedings affecting those interests.[4] The rule that all parties interested in the result are entitled to attend before the master applies not only to those who are parties to the record, but to those who are "*quasi*-parties," by having come in under the decree and established a claim.[5]

[13] Ibid.

[14] Ibid. See Manhattan Co. v. Evertson, 4 Paige (N. Y.), 276.

§ 310. [1] Daniell's Ch. Pr., ch. xxvi. See Johnson v. Waters, 111 U. S. 640.

[2] Daniell's Ch. Pr., ch. xxvi.

[3] Ibid.

[4] Ibid.

[5] Ibid.

In a suit for the distribution of a fund, or creditors' suit, it is the usual practice for the court to make an order directing that all parties interested present their claims within a time prescribed in the order or by the master; and that the master publish a notice to that effect in certain newspapers.[6] Such an order does not apply to a person who claims the title to specific property, such as a trust fund, of which a receiver has possession.[7] After the expiration of the time thus limited, any creditor or other person interested in the fund may come in and prove his claim at any time before the final distribution of the fund, although an order from the court authorizing such belated proof is usually required.[8] In case a partial but not a complete distribution of the funds has then been made, in bankruptcy at least he can only share in the subsequent dividends.[9] After distribution a person who has thus failed to prove his claim before the master may file a bill against the persons between whom the funds have been distributed to compel them to refund his *pro rata* share, but he cannot sue the master or receiver.[10] A party who has appeared, but allowed a decree to be taken against him by default for want of an answer, is, it seems, entitled to notice of the proceedings against him under the decree in the master's office;[11] but cannot appear upon such notice before the master without previously obtaining an order for that purpose, which is usually only granted upon terms.[12] The proper course to test a party's right to attend before a master is, after the latter's refusal, to apply to the court by petition for an order permitting the party to attend before him.[13]

§ 311. Proceedings before a master in general.— The rules give the master authority to regulate all the proceedings upon a reference to him.[1] In case of an abuse of his discretion by a master, any party aggrieved may apply to the court for an order, requiring the master to act properly;[2] but such

[6] Continental Tr. Co. v. Toledo, St. L. & K. C. R. Co., 82 Fed. R. 642, 646.

[7] N. Y. Security & Tr. Co. v. Lombard I. Co., 75 Fed. R. 172.

[8] Wilder v. Keeler, 23 Paige (N. Y.), 164.

[9] In re Stein, 94 Fed. R. 124.

[10] David v. Frowd, 1 M. & K. 200; Gillespie v. Alexander, 3 Russ. 130; Sawyer v. Birchmore, 1 Keen, 391; Daniell's Ch. Pr. (1st Am. ed.) 1403.

[11] King v. Bryant, 3 M. & C. 191; Daniell's Ch. Pr., ch. xxvi.

[12] Heyn v. Heyn, Jacob, 49; Daniell's Ch. Pr., ch. xxvi.

[13] Daniell's Ch. Pr., ch. xxvi.

§ 311. [1] Rule 77.

[2] Daniell's Ch. Pr., ch. xxvi; Bate

applications are not encouraged,[3] and are only granted in extraordinary cases.[4] If any party fail to appear at the appointed time and place, the master may either proceed *ex parte*, or, in his discretion, may adjourn the proceedings.[5] In the latter case, he should give notice of the adjournment to the party who failed to appear, or to his solicitor.[6] It is the master's duty to proceed in the reference with all reasonable diligence and with the least practicable delay.[7] Otherwise, either party may apply to the court, or a judge thereof, for an order requiring the master to speed the proceedings and to make his report, and to certify to the court or judge the reasons for any delay.[8] There is no necessity for the master's taking any oath, unless the order of reference especially requires him to do so.[9] All parties who are required to account before a master must bring in their accounts in the form of debtor and creditor.[10] Should a party fail to do so, the master may make an order requiring him to furnish such an account.[11] The order should not be granted till the first hearing of the reference.[12] The order must be served personally with a copy of this order and a notice of the day to which the hearing is adjourned.[13] Service may be made by any disinterested person.[14] If the defendant then fails to appear and account, he is in contempt.[15] If any of the other parties is dissatisfied with the accounts rendered, he may examine the accounting party either orally or by interrogatories or by deposition, as the master directs.[16] By the English practice, the time for a single hearing before a master did not usually exceed one hour, unless the master continued the hearing longer, when an increased fee might, it seems, be charged.[17] It was the duty of the master or his clerk

Ref. Co. v. Gillette, 28 Fed. R. 673; Rule 75. See Re Thomas, 35 Fed. R. 337, 340.

[3] Lull v. Clark, 20 Fed. R. 454; Wooster v. Gumbirnner, 20 Fed. R. 167; Bate Ref. Co. v. Gillette, 28 Fed. R. 673.

[4] Lull v. Clark, 20 Fed. R. 454; Wooster v. Gumbirnner, 20 Fed. R. 167; Bate Ref. Co. v. Gillette, 28 Fed. R. 673.

[5] Rule 75.

[6] Rule 75.

[7] Rule 75.

[8] Rule 75.

[9] Thompson v. Smith, 2 Bond, 320.

[10] Rule 79.

[11] Kerosene L. H. Co. v. Fisher, 1 Fed. R. 91.

[12] Ibid.

[13] Ibid.

[14] Ibid.

[15] Ibid.

[16] Rule 79.

[17] Daniell's Ch. Pr., ch. xxvi.

to mark in the master's book the names of the solicitors who attended, and no other attendance than those so marked was allowed in taxing costs.[18] In the Southern District of New York, a master is forbidden to adjourn a reference for more than ten days without the written consent of all the parties or the authorization of one of the judges.[19]

§ 312. A state of facts.—By the English practice a party who intended to examine witnesses before a master under a decree was obliged to carry in a state of facts detailing the circumstances which he desired to prove.[1] This was also the general form by which the prosecution of every reference to a master was commenced.[2] "A state of facts, as its name imports, is a statement in writing, made by a party who wishes to prosecute or resist any inquiry before a master, of the facts and circumstances upon which he relies, either in support of his own cause, or in contradiction or defeasance of that of his adversary. It is, in effect, the pleading of the party before the master, and is governed by nearly the same rules and principles as pleadings in the court, although, not being signed, nor, in general, prepared by counsel, they are not always so strictly observed. A state of facts, however, must be pertinent to the matter, and must not, any more than any other proceeding in the cause, contain any scandal; and if it is either scandalous or impertinent, the scandalous or impertinent matter may be expunged, in the manner which will be presently pointed out. A state of facts is intituled in the cause, and contains a detail of the facts and circumstances intended to be relied upon by the party: when the party carrying in the state of facts makes any claim upon the fund in court, it is usual to conclude the statement with the particulars of the claim, in the manner of a prayer for relief to the bill, as follows: — 'And the said A. B., therefore, claims, etc.;' in such case the proceeding is called 'a state of facts and claims.' When the object of the party is to charge another with the receipt of money, etc., the state of facts concludes with a charge in the following form: — 'and the said A. B., therefore, charges, etc.;' in such case the proceeding is called 'a state of facts and charge.' It may be remarked, that a charge is not always preceded by a

[18] Daniell's Ch. Pr., ch. xxvi.
[19] Rule 115 of U. S. C. C., S. D. N. Y.

§ 312. [1] Daniell's Ch. Pr., ch. xxvi.
[2] Ibid.

state of facts, but if the matter appears from any admissions in any account, or examination or proceeding in the master's office, and requires no other proof in support of it, it is usual to make 'a charge' only. When a state of facts is prepared, it is carried in to the master's office and a warrant 'on leaving' must be served upon the other parties, who may then apply for and obtain copies from the master's clerk, and if they have a counter state of facts to leave, they must proceed in the same manner. It is usual to add to a state of facts, a sort of petition, that the party may be at liberty to add to, alter, or vary the state of facts, as he may be advised; and it is presumed, that such form was originally considered necessary, to enable the party to amend his state of facts, after it has been delivered in. It is, however, now an unnecessary form, as a state of facts may be amended at any time, or a further state of facts carried in, upon leaving which, a warrant, 'on leaving,' should be taken out and served, as when an original state of facts is left."[3] It has been held that an amendment should not be allowed after the case has been submitted to the master for decision.[4]

§ 313. Evidence before a master.—"All affidavits, depositions, and documents which have been previously made, read or used in the court upon any proceedings in any cause or matter may be used before the master."[1] These should, however, be regularly offered in evidence, so that the other party may have an opportunity to explain or rebut them.[2] Otherwise, they cannot be referred to upon the argument, or used in support of the report.[3] The master has power to examine under oath the parties in the cause, and any witnesses produced by them,[4] and any creditor or other person coming in to claim before him.[5] The evidence should be taken down in writing by

[3] Daniell's Ch. Pr., ch. xxvi.

[4] Clyde v. Richmond & D. R. Co., 59 Fed. R. 894; Central Tr. Co. v. Marietta & N. G. Ry. Co., 75 Fed. R. 41.

§ 313. [1] Rule 80. But see Hammacher v. Wilson, 32 Fed. R. 796. Upon the reference of a claim of a judgment creditor for a preference, his judgment roll is admissible to prove the date when he began the suit, the nature of his cause of action and the amount of damages recovered by him, and it was held to be *prima facie* evidence of those facts against a mortgagee. Southern Ry. Co. v. Bouknight (C. C. A.), 70 Fed. R. 442, per Fuller, C. J.

[2] Bell v. U. S. Stamping Co., 32 Fed. R. 549.

[3] Ibid.

[4] Rule 77.

[5] Rule 81.

the master, or by some one in his presence, so that the court may use the same.[6] Witnesses who live in the district may, upon due notice to the opposite party, be summoned to appear before a master, by a subpœna issued from the clerk's office in blank and filled by the party applying for the same, or by the master, requiring the attendance of the witnesses at a time and place therein specified.[7] Such witnesses are entitled to the same compensation as for attendance in court.[8] A refusal to appear in obedience to such a subpœna is a contempt punishable by the court or a judge thereof by an attachment issued upon the master's certificate.[9] Upon the master's certificate a commission issues from the clerk's office to take the depositions of witnesses according to the acts of Congress or equity rules.[10] Under extraordinary circumstances, a master may take testimony beyond the territorial jurisdiction of the court.[11] A master has power to direct the mode in which matters requiring evidence shall be proved before him.[12] The court[13] may but rarely will interfere with the master's ruling in this respect before his report is brought before it for review.[14]

§ 314. Masters' reports and compensation.— The final decision of a master upon matters referred to him is embodied in his report to the court. He is forbidden by the rules to recite at length any part of any paper or deposition brought in or used before him.[1] He is, however, required to refer to and identify every state of facts, charge, affidavit, deposition, examination, or answer used before him, so as to inform the court concerning the pleadings and evidence which he considered in reaching the conclusions embodied in his report.[2] It is the better practice for a master before making his report to prepare and serve on the parties a draft of the same, with notice of a time and place when and where he will hear their objections thereto.[3] At the appointed time, counsel should

[6] Rule 81.
[7] Rule 78.
[8] Rule 78.
[9] Rule 77.
[10] Rule 77.
[11] Bate Ref. Co. v. Gillette, 28 Fed. R. 673.
[12] Rule 77.
[13] Webster L. Co. v. Higgins, 43 Fed. R. 673.
[14] Lull v. Clark, 20 Fed. R. 454; Wooster v. Gumbirnner, 20 Fed. R. 167; Third Nat. Bank of Philadelphia v. Nat. Bank of C. V., 86 Fed. R. 852.

§ 314. [1] Rule 76.
[2] Rule 76. See In re Thomas, 35 Fed. R. 337, 339.
[3] Fischer v. Hayes, 16 Fed. R. 469; Jennings v. Dolan, 29 Fed. R. 861.

appear, make their objections to the proposed report, and see that these objections are noted in writing and filed with the master.[4] This is the practice in the Second Circuit.[5] The practice is, however, in some circuits very loose in this respect.[6] The report may be either general, covering all the matters referred; or special, confined to a part which can be conveniently severed from the rest, and where it is for the interest of persons thereby affected not to delay till the whole case is determined.[7] A master cannot retain his report as security for his compensation.[8] His compensation is fixed by the court in its discretion with regard to the circumstances of each particular case.[9] As soon as the report is ready, the master should file the

[4] Fischer v. Hayes, 16 Fed. R. 469; Story v. Livingston, 13 Pet. 359.

[5] Fischer v. Hayes, 16 Fed. R. 469; Jennings v. Dolan, 29 Fed. R. 861.

[6] Hatch v. Indianapolis & S. R. Co., 9 Fed. R. 856.

[7] Daniell's Ch. Pr. (1st Am. ed.) 1475, 1476.

[8] Rule 82.

[9] Rule 82; Erie Ry. Co. v. Heath, 10 Blatchf. 214; Middleton v. Bankers' & M. Tel. Co., 32 Fed. R. 524. In an extraordinary case the Circuit Court of Appeals may review the order fixing a master's compensation. Brown v. King, 62 Fed. R. 529, where $12,500 for work during two years was held excessive; Finance Committee v. Warren (C. C. A.), 82 Fed. R. 525, where it was held that an allowance of $4,000 to a master for the sale of a railroad one hundred and twelve miles long was excessive, and that $2,500 was ample compensation. Much larger amounts have, however, frequently been granted. See Erie R. Co. v. Heath, 10 Blatch. 214. The court may modify an order fixing the annual compensation of a master even after the service has been performed. Pleasants v. Southern Ry. Co., 93 Fed. R. 93. An agreement between the parties as to the compensation of a master when made before his appointment is against public policy and will not be enforced. Finance Committee v. Warren (C. C. A.), 82 Fed. R. 525. The master's compensation is charged upon and borne by such of the parties to the cause as the court may direct (Rule 82). A master's compensation upon an accounting is usually imposed in the first instance upon the accounting party. Urner v. Kayton, 17 Fed. R. 539; s. c., 17 Fed. R. 845. It has been held that each party should pay for the expense, including the stenographer's fees, of taking his own examinations, both direct and cross, and for adjournments taken at his request, when a charge is properly made for the same. Where a session is partly taken up with direct and partly with cross-examination, or partly by argument, the expense must be equally divided. Charges for time occupied in the consideration and decision of questions involved and in the preparation of the report must be equally divided. Brickill v. Mayor, etc. of N. Y., 55 Fed. R. 565. The order adjusting a master's compensation should name the party who is required to pay it, and a time within which payment is to be made. Failure to comply with the order is punishable by attachment for contempt of court (Rule 82). It seems, how-

same in the clerk's office; and the clerk should enter the day of the return in the order book.[10] If no exceptions are filed within one month from the time of filing, the report is considered as confirmed on the next rule-day after the month has expired.[11] Upon consent of the parties[12] or at the request of the master the court may allow the report to be withdrawn for the correction of a mistake by him; but in such a case it is improper for him to reverse his rulings upon the law or the evidence, except upon notice to all parties affected, and after a hearing of any of them who wish to be heard.[13]

§ 315. Exceptions to masters' reports.— Exceptions to the report of a master must be filed within one month from the filing of the report.[1] No exception will lie to a ruling before the report was made which was not objected to before the master.[2] In circuits where it is not the practice for masters to serve drafts of their reports, an exception to the report, but not an exception to a ruling in evidence, can be filed without a preliminary objection.[3] Such an exception has also been permitted after a draft of the report had been served, and no objection made thereto.[4] Objections in support of exceptions may be allowed to be filed *nunc pro tunc*.[5] Exceptions should specifically point out the errors of which they complain, and if they rely on any part of the testimony, it is the safer practice to have them either state the same or refer thereto, so

ever, that payment pending a suit can only be compelled on the application of the master or his representative, not at the request of a party. Mallory Mfg. Co. v. Fox, 20 Fed. R. 409. The compensation of a master appointed to determine claims against property in the custody of the court is usually paid from the proceeds of such property, and he usually has a preference above all liens upon the same. Pennsylvania Co. v. Jacksonville, T. & K. W. Ry. Co., 98 Fed. R. 60.

[10] Rule 83.

[11] Rule 83; Burns v. Rosenstein, 135 U. S. 449, 455.

[12] W. U. Tel. Co. v. Am. Bell Tel. Co., 50 Fed. R. 662.

[13] National F. B. & P. Co. v. Dayton P. N. Co., 91 Fed. R. 822.

§ 315. [1] Rule 83; Fidelity Ins. & S. D. Co. v. Shenandoah I. Co., 42 Fed. R. 372. But see Central T. Co. v. Wabash, St. L. & P. Ry. Co., 27 Fed. R. 175.

[2] Troy I. & N. Factory v. Corning, 6 Blatchf. 328; Fischer v. Hayes, 16 Fed. R. 469; Story v. Livingston, 13 Pet. 359. But see Hatch v. Indianapolis & S. R. Co., 9 Fed. R. 856; Jennings v. Dolan, 29 Fed. R. 861.

[3] Hatch v. Indianapolis & S. R. Co., 9 Fed. R. 856; Fidelity I. & S. D. Co. v. Shenandoah I. Co., 42 Fed. R. 372. See Jennings v. Dolan, 29 Fed. R. 861.

[4] Jennings v. Dolan, 29 Fed. R. 861.

[5] Fischer v. Hayes, 16 Fed. R. 469.

that the court can without difficulty find it.[6] Exceptions to the report of a master upon a reference to compute damages for the infringement of a patent, which raised the points that the infringement was not wilful, that the reduction of plaintiff's profits was not solely due to the infringement, and that the master should have reported nominal damages, were held sufficient to bring before the court the whole subject of the computation of damages.[7] It has been held that the point that a statute is unconstitutional need not be specifically stated in the exception.[8] Exceptions to the admission or exclusion of evidence, taken upon the hearing before the master, need not be restated in the exceptions filed to this report.[9] If the court is in session when exceptions are filed, they are argued at that session;[10] otherwise at the next session.[11] Every presumption is in favor of the correctness of the decision of a master.[12] If the testimony is conflicting, the court will rarely interfere with the master's decision on the facts, provided he made no errors in law which affected the result.[13] Where the order directed the master to state the facts, his findings have as much weight as the verdict of a jury.[14] Where the issues are by stipulation tried before a master, only questions of law can be reviewed.[15] Where after a master's report had been

[6] Harding v. Handy, 11 Wheat. 103; Foster v. Goddard, 1 Black, 506; Greene v. Bishop, 1 Cliff. 186; Stanton v. Alabama & C. R. Co., 2 Woods, 506; Cutting v. Florida Ry. & Nav. Co., 43 Fed. R. 743, 747. In Duden v. Maloy, 43 Fed. R. 407, 410, the following exception was held to be insufficient according to the practice in the Second Circuit, and was consequently disregarded: "For that the master has found contrary to the preliminary requisitions and objections of defendant to his proposed draft report, and which requisitions and objections he here repeats, and contends that fresh evidence should be taken thereon." "All that is necessary is that the exception should distinctly point out the finding and the conclusion of the master which it seeks to reverse." Foster v. Goddard, 1 Black, 506, 509, per Swayne, J. See Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 57 Fed. R. 441, 444.

[7] Boesch v. Graff, 133 U. S. 697.

[8] Fidelity Ins. & S. D. Co. v. Shenandoah Iron Co., 42 Fed. R. 872, 874.

[9] Marks v. Fox, 18 Fed. R. 718.

[10] Rule 83.

[11] Rule 83.

[12] Medsker v. Bonebrake, 108 U. S. 66; Tilghman v. Proctor, 125 U. S. 136; Callaghan v. Myers, 128 U. S. 617, 666; Kimberly v. Arms, 129 U. S. 512, 524.

[13] Welling v. La Bau, 34 Fed. R. 40; Mason v. Crosby, 3 W. & M. 258; Gottfried v. Crescent Brg. Co., 22 Fed. R. 433; Jaffrey v. Brown, 29 Fed. R. 476; Central Tr. Co. v. T. & St. L. Ry. Co., 32 Fed. R. 448.

[14] Davis v. Schwartz, 155 U. S. 631.

[15] Shipman v. Ohio Coal Exchange

filed a judgment finding facts opposite to those found by the master had been entered in a State court, in a suit between the same parties, it was held that the judgment of the State court must be followed on the hearing of the exceptions to the report of the master.[16] Trifling errors in a master's statement of an account will be disregarded.[17] Where upon an accounting the court sustained an exception by one of several persons having a common interest in the fund, and thus surcharged the account, it was held by two State courts that all persons interested took the benefit of the exception and of the increase of the fund, and that the decree should not merely add to the share of the exceptor his proportion of the amount surcharged.[18] Exceptions to a master's report are only proper when he has made an erroneous decision upon the matters referred to him.[19] An irregularity in his appointment cannot thus be questioned.[20] The remedy for an irregularity in his proceeding, or for his neglect to report upon all the matters referred to him, is a motion to set aside the report, or to refer the same back to the master.[21] A report of a master may be corrected without a re-reference, from facts appearing in the case aside from the evidence taken before him.[22] Where exceptions to the report of a master are sustained, the court has discretionary power to order a re-reference for further testimony or to enter a final decree upon the facts appearing in the case; and an appellate court will not ordinarily interfere with the exercise of such discretion.[23] It has been held in the Second Circuit that if the master errs by an improper rejection of evidence, his error should be corrected by an immediate motion to compel him to receive the evidence, and is not the proper subject of an exception to his report.[24] The party who files exceptions is

(C. C. A.), 70 Fed. R. 652; Farrar v. Bernheim (C. C. A.), 75 Fed. R. 136.

[16] Duden v. Maloy, 43 Fed. R. 407.

[17] Taylor v. Robertson, 27 Fed. R. 587.

[18] Martin's Appeal, 88 Pa. St. 395; Landis v. Scott, 82 Pa. St. 495; Estate of Chalmers, N. Y. L. J. of April 8, 1897.

[19] Taylor v. Robertson, 27 Fed. R. 587.

[20] Seaman v. N. W. M. L. Ins. Co., 86 Fed. R. 493, 497; N. Y. M. L. Ins. Co. v. Seaman, 80 Fed. R. 357.

[21] Tyler v. Simmons, 6 Paige Ch. (N. Y.) 127.

[22] Witters v. Soule, 43 Fed. R. 405; Kelsey v. Hobby, 16 Pet. 269; Parks v. Booth, 102 U. S. 96.

[23] Mosher v. Joyce, 51 Fed. R. 441.

[24] Celluloid Mfg. Co. v. Cellonite Mfg. Co., 40 Fed. R. 476, 478.

obliged to pay costs for each exception overruled, and is entitled to costs for each exception allowed.[25] The amount of costs is fixed by the court in accordance with a standing rule in each circuit.[26] By leave of the court exceptions may be amended.[27] An objection to a master's report not raised below will ordinarily be considered upon an appeal.[28] The review of a master's report upon a receiver's account is described in a preceding section.[29]

§ 316. Sales by masters.— In a proper case, a court of equity, having the possession by a receiver of the property of an insolvent railway company, may make an interlocutory decree or order for the sale of the property by a master before the rights of the parties under the several mortgages have been fully ascertained and determined.[1] In such a case an appeal may be taken at once from the order for the sale, provided the sale is to take place immediately;[2] but not if any subsequent proceedings and order must precede the sale.[3] Pending an appeal, the court which ordered the sale may postpone the same, although no *supersedeas* has been obtained and the term at which the decree was entered has expired.[4] A foreclosure sale should not be ordered until the amount due from the mortgagor has been judicially determined so that he and junior incumbrancers may be able to intelligently decide whether to redeem.[5] A substantial error in such an adjudication will ne-

[25] Rule 84.

[26] Rule 84.

[27] Jones v. Lamar, 89 Fed. R. 585.

[28] Topliff v. Topliff, 145 U. S. 156, 173.

[29] *Supra*, § 256.

§ 316. [1] Pennsylvania R. Co. v. Allegheny V. R. Co., 42 Fed. R. 82, 85; First Nat. Bank v. Schedd, 121 U. S. 74. The fact that the title to land is being litigated in another court is not an insuperable objection to its judicial sale. Fidelity L., Tr. & S. D. Co. v. Roanoke Iron Co., 84 Fed. R. 752.

[2] First Nat. Bank v. Schedd, 121 U. S. 74.

[3] Burlington, C. R. & N. Ry. Co. v. Simmons, 123 U. S. 52, 55.

[4] Bound v. South Carolina Ry. Co., 55 Fed. R. 186. As to laches which will defeat an application for an injunction to stay a sale, see Duncan v. Atlantic M. & O. R. Co., 88 Fed. R. 840; Foley v. Guaranty Tr. & S. D. Co. (C. C. A.), 74 Fed. R. 759.

[5] Chicago, D. & V. R. Co. v. Fosdick, 106 U. S. 47. It has been said that a decree is not defective where it fails to adjudicate before the sale the amount of costs, counsel fees and compensation to the trustee which it requires the mortgagor to pay in order to redeem the property. Grape C. C. Co. v. Farmers' L. & Tr. Co. (C. C. A.), 63 Fed. R. 891, 896. See Alabama & G. Mfg. Co. v. Robinson (C. C. A.), 72 Fed. R. 708, 712. It is customary

cessitate a reversal of the decree.[6] A sale of real estate beyond the jurisdiction of the court is void unless confirmed by the owner.[7] A court of equity will not make an interlocutory order for an immediate sale of mortgaged property upon terms discharging the lien of a mortgage not yet due, unless it clearly appears that in the end there must be not only a sale of the property, but a sale upon those terms.[8] When property is ordered to be sold by a master, it must be sold at public auction, unless the court otherwise directs.[9] Such a sale is conducted under the superintendence of the solicitor for the party at whose prayer the sale is made, and in all questions which subsequently arise between the buyer and the seller it is said that he is considered as the agent of all the parties to the suit.[10] The particulars, conditions and notices of the sale are prepared by him, subject to the approval of the master, when not prescribed in the order for the sale.[11] They should be entitled in the cause, and should contain a general description of the nature and situation of the property; and if land is sold, the notices should state in whose possession it is or has lately been.[12] The conditions of the sale should be in general similar to those annexed to ordinary sales of similar property in the vicinity.[13] A sale by a receiver is not invalidated by his announcement at the sale that the purchaser will have the option also to buy other property not covered by the order of sale but acquired by him

to order a reference to a master to determine the amount due, but the court may make the computation without a master's aid. Brown v. Grove (C. C. A.), 80 Fed. R. 564.

[6] James v. Milwaukee & M. R. Co., 6 Wall. 752; Chicago, D. & V. R. Co. v. Fosdick, 106 U. S. 47; Alabama & G. M. Ry. Co. v. Robinson (C. C. A.), 56 Fed. R. 690; Grape C. C. Co. v. Farmers' L. & Tr. Co. (C. C. A.), 68 Fed. R. 891.

[7] Lynde v. Columbus, C. & I. C. Ry. Co., 57 Fed. R. 993. See Carpenter v. Strange, 141 U. S. 87, 106; Muller v. Dows, 94 U. S. 444, 449; *infra*, § 319.

[8] Pennsylvania R. Co. v. Allegheny V. R. Co., 42 Fed. R. 82, 86. It has been held that in a suit in equity by an assignee in bankruptcy to recover assets of the bankrupt, a District Court may order the real property sold free of all incumbrances. In re Mead, 58 Fed. R. 312.

[9] Daniell's Ch. Pr., ch. xxvi; Hutson v. Sadler, 31 W. Va. 358; Bound v. South Carolina Ry Co., 46 Fed. R. 315.

[10] Dalby v. Pullen, 1 R. & M. 296. But see Blossom v. Railroad Co., 3 Wall. 196, 207.

[11] Daniell's Ch. Pr., ch. xxvi.

[12] Ibid.

[13] Ibid. See Bacon v. N. W. M. L. I. Co., 131 U. S. 258; Treadwell v. United V. C. Co., 47 App. Div. (N. Y.) 613.

in the due course of his receivership.[14] The sale should be advertised at least twice, and the advertisement should give such a description of the property as clearly to indicate and identify it.[15]

A recent statute provides: "That hereafter no sale of any real estate under any order, judgment or decree of any United States court shall be had without previous publication of notices of such proposed sale being ordered and had once a week for at least four weeks prior to such sale, in at least one newspaper printed, regularly issued and having a general circulation in the county and State where the real estate proposed to be sold is situated, if such there be."[16] The master has power to adjourn the sale, even after the auction has begun and bids have been made.[17] The sale is conducted in substantially the following manner: The master, his clerk, or a person appointed by him, is present with a paper upon which the biddings for the different lots are to be marked.[18] The lots are successively put up at a price offered by any person present; such person, according to the English practice, signing his name to the sum which he offers on the paper.[19] If the property to be sold consists of a railroad and its appurtenances, it

[14] Lake S. I. Co. v. Brown, Bonnell & Co., 44 Fed. R. 589.

[15] Kauffman v. Walker, 9 Md. 229; Merwin v. Smith, 1 Green Ch. (N. J.) 182; Daniell's Ch. Pr., ch. xxvi. See Ray v. Oliver, 6 Paige (N. Y.), 489; Treadwell v. United V. C. Co., 47 App. Div. (N. Y.) 618.

[16] 27 St. at L. 754. It has been held that such an advertisement once a week for only twenty-seven days before the sale is not a compliance with the statute, Wilson v. N. Y. Mut. L. I. Co., 65 Fed. R. 38; and that a foreclosure sale cannot be collaterally attacked in another suit filed by creditors against the mortgagees and others because of the failure of the decree to comply with a State statute regulating the time allowed for a redemption before a sale. Andrews v. National F. & P. Works (C. C. A.), 77 Fed. R. 774. A State court has held that where a sale is adjourned no advertisement of the adjournment is required. White v. Zust, 28 N. J. Eq. 107. It has been held that a party waives any objection founded upon a failure to comply with this statute, by not opposing a motion to confirm the sale, of which notice has been served upon his attorney in the suit. Nevada Nickel Syndicate v. National N. Co., 103 Fed. R. 391.

[17] Blossom v. Railroad Co., 3 Wall. 196.

[18] Daniell's Ch. Pr., ch. xxvi. The decree for the sale need not name the master who is to conduct it; and in case of such an omission the sale can be conducted by any master in whose hands plaintiff places a certified copy of the decree. Seaman v. N. W. M. L. I. Co., 86 Fed. R. 493, 497.

[19] Daniell's Ch. Pr., ch. xxvi.

is usually sold as a single thing.[20] It has been said that railroad property cannot be thus sold piecemeal except by the consent of all the parties expressed in open court or in writing.[21] The court may make a condition of the sale that no bid shall be considered unless each bidder first deposit a specified sum in cash,—in one instance $25,000;[22] in another $50,000,[23]—and that no bid be considered unless it exceed a specified amount.[24] Every subsequent bidder must do like the first until no person will advance on the last bid, when the latter is declared the purchaser;[25] unless there has been a reserved bidding fixed, when if the last bidding does not reach the reserved one, the person conducting the sale declares that the lot has not been sold, but has been bought in by the persons interested in the estate.[26] The court may authorize payment of a bid in bonds secured by the mortgage which is foreclosed.[27] It seems that the court may direct that the sale be made for cash, in a suit under a railroad mortgage which provides that the purchase-money may be paid in bonds.[28] In general, the courts are prone to construe provisions in a trust deed regulating the time and manner of the sale as applicable only to a sale under the power without an application to the court; and unless

[20] Bound v. South Carolina Ry. Co., 46 Fed. R. 315; Compton v. Jesup (C. C. A.), 68 Fed. R. 263. This was done where a mortgage secured three series of bonds, each of which had a prior lien upon one of three divisions of the railroad and a subordinate lien upon the other two. Farmers' L. & Tr. Co. v. Cape F. & Y. V. Ry. Co., 82 Fed. R. 344. The ordinary rule that mortgaged premises must be sold in the inverse order of their alienation is not strictly applied when it would produce an inequitable result. Phila. M. & Tr. Co. v. Needham, 71 Fed. R. 597. See Riggs v. Clark, 71 Fed. R. 560; Central Tr. Co. v. Sheffield & B. C. I. & Ry. Co., 60 Fed. R. 9.

[21] Bound v. South Carolina Ry. Co., 46 Fed. R. 315, 316.

[22] Farmers' L. & Tr. Co. v. G. B. & M. R. Co., 10 Biss. 203.

[23] Turner v. L. B. & W. Ry. Co., 8 Biss. 315.

[24] Farmers' L. & Tr. Co. v. Houston & T. C. R. Co., Pardee and Sabin, JJ., May, 1888; Hervey v. Illinois Mid. Ry. Co., U. S. C. C., S. D. Ill., June 10, 1886; Roosevelt v. Columbus, C. & I. C. Ry. Co., U. S. C. C., N. D. Ill., Drummond, J., Nov. 15, 1882; Jesup v. Wabash, St. L. & P. Ry. Co., U. S. C. C., N. D. Ill., Gresham and Jackson, JJ., 1889, and many other foreclosure cases.

[25] Daniell's Ch. Pr., ch. xxvi.

[26] Ibid.

[27] Ketchum v. Duncan, 96 U. S. 659. As to payment in stock, see Treadwell v. United V. C. Co., 47 App. Div. 618, 619.

[28] Farmers' L. & Tr. Co. v. G. B. & M. R. Co., 10 Biss. 203; s. c., 6 Fed. R. 100.

they create substantial rights they are not always followed in a judicial foreclosure sale.[29]

A bid may be revoked any time before the hammer falls.[30] A party to the suit who is not a trustee has the right to buy at the sale without expressing leave in the order or decree, although it is usual to grant such permission expressly.[31] A sale does not take effect until it has been confirmed by the court.[32] The proper practice in order to obtain a confirmation of a sale is to obtain an order *nisi*, unless cause to the contrary be shown within a specified time, that the sale shall be confirmed, and, after service of the same upon the parties to the cause or their solicitors, to apply to the court for an order of confirmation absolute confirming upon the production of an affidavit of the service of the order *nisi* and proof that no cause has been shown.[33] The court may confirm the sale in vacation as well as term time.[34]

Before the confirmation of the sale any person interested, whether a party or a stranger, may intervene and have the sale set aside upon payment of the purchaser's expenses and the offer of a sufficient advance in price.[35] Before the confirma-

[29] Low v. Blackford (C. C. A.), 87 Fed. R. 892; Toler v. East Tenn., V. & G. Ry. Co., 67 Fed. R. 168.

[30] Blossom v. Railroad Co., 3 Wall. 196. See Mayhew v. West Va. O. & O. L. Co., 24 Fed. R. 205, 215.

[31] Smith v. Black, 115 U. S. 308; Pewabic Mining Co. v. Mason, 145 U. S. 349, 363. "Such a provision is inserted merely to obviate the technical rule that parties to the action cannot buy, and is not intended to determine equities between the parties to the action, or between such parties and others." Scholle v. Scholle, 101 N. Y. 167, 172. Where a trustee has an interest which he wishes to protect by bidding at the sale, he may obtain leave to bid upon a special application to the court upon notice to all parties interested. Scholle v. Scholle, 101 N. Y. 167, 172; Merkle's Estate, 182 Pa. St. 378. See also Cooley v. Cooley's Heirs (Tenn. Ch. App.), 37 S. W. R. 1028.

[32] Mayhew v. West Va. O. & O. L. Co., 24 Fed. R. 205, 215; Pewabic M. Co. v. Mason, 145 U. S. 349, 364; Tennessee v. Quintard (C. C. A.), 80 Fed. R. 829, 835.

[33] Pewabic M. Co. v. Mason, 145 U. S. 349, 363, 364; Daniell's Ch. Pr. (1st Am. ed.) 1461. The English practice, which has been followed in the District of Michigan, is to provide in the order *nisi* that cause be shown within eight days. Ibid. In railroad foreclosures and other cases where the persons interested live at a distance from the place or sale, more time should be allowed.

[34] Central T. Co. of New York v. Sheffield & B. C. I. & Ry. Co., 60 Fed. R. 9.

[35] Blackburn v. Selma R. Co., 3 Fed. R. 689; Central Tr. Co. v. Sheffield & B. C. I. & Ry. Co., 60 Fed. R. 9.

tion, any person may intervene and obtain an order establishing a lien upon the property.[36] The confirmation may be upon terms,[37] or subject to such claims against the property as may thereafter be asserted.[38] As a condition of the confirmation of the sale, the purchaser may be required to assume responsibility for obligations of the receiver or for the payment of claims entitled to a preference over the mortgage.[39] Such provisions in the decree for a sale or for a confirmation of a sale are considered to be equivalent to the reservation of a lien for the payment of purchase-money, and they may be enforced by the court upon a summary application at any time.[40] Should the purchaser fail to pay any part of the amount promised, a resale will be ordered either before or after the confirmation of the original sale, provided that the rights of third persons have not

[36] Tennessee v. Quintard (C. C. A.), 80 Fed. R. 829.

[37] Farmers' L. & Tr. Co. v. G. B. & M. R. Co., 10 Biss. 203; s. c., 6 Fed. R. 100; F. L. & Tr. Co. v. Central R. Co. of Iowa, 17 Fed. R. 758.

[38] Tennessee v. Quintard, 80 Fed. R. 829.

[39] Farmers' L. & Tr. Co. v. Central R. of Iowa, 17 Fed. R. 758. Where an appeal has been taken from so much of a bill as grants a preference, the confirmation may be conditioned upon the payment to a surety upon a *supersedeas* bond of the amount paid by such surety to the preferred creditor upon an affirmance; or a lien upon the property may be given to such surety. Continental Tr. Co. v. American Surety Co. (C. C. A.), 80 Fed. R. 180. Where a decree of sale directs that the purchaser pay certain preferential claims, he cannot upon such payment be subrogated to the rights of the original claimants and prove the claims against the fund in the hands of the receiver for distribution. Morgan's L. & T. R. & S. S. Co. v. Moran, 91 Fed. R. 22. *Cf.* Southern Ry. Co. v. Bouknight, 70 Fed. R. 442. It has been said that the assignee of a purchaser cannot set up against such claims a title acquired at a subsequent sale by another court. Baltimore Tr. & G. Co. v. Hofstetter (C. C. A.), 85 Fed. R. 75. It has been held that a decree directing the sale of railroad property upon foreclosure, "subject only to the liens, in respect to the portions of property enumerated, to the burden of which such sales were specified herein directed to be made," by implication releases the purchaser from liability to pay taxes which accrued before or during the receivership; and that he can insist upon the payment of such taxes from the earnings of the receivership or out of the purchase money. The same case holds that, in the absence of a provision in the decree to the contrary, the purchaser of railroad property at foreclosure sale takes the same subject to any existing defects in its title, and that he cannot insist that claims for unpaid rights of way shall be paid from the proceeds of the sale. First Nat. Bank v. Ewing, 103 Fed. R. 168. See *infra*, § 825.

[40] Continental Tr. Co. v. American S. Co. (C. C. A.), 80 Fed. R. 180. See Dubuque & S. C. R. Co. v. Pierson (C. C. A.), 70 Fed. R. 303.

intervened.[41] He may be compelled by attachment issued upon a rule, or order to show cause without a new suit, to pay the difference between his bid and the amount realized from the second sale, even though the sale has not been confirmed.[42] Such a resale may be ordered by a summary proceeding upon the return of an order to show cause served upon the purchaser,[43] and upon the parties at whose suit the sale was made.[44]

A judicial sale may be set aside for fraud,[45] mistake,[46] accident or other unconscionable circumstances.[47] It seems that the stockholders of a corporation hold their voting power and control over the officers subject to a *quasi*-trust for the benefit of its creditors; that consequently when they or their officers waive a defense or take other proceedings which shorten a foreclosure suit, an arrangement made orally or in writing before the sale under which the purchasers reorganize the assets and convey them to a new corporation, the bonds and stock of which are divided among the bond and stockholders of the mortgagor, excluding any other creditors from an interest in the same, even when stockholders have to pay for the right to participate in the reorganization, is fraudulent, and that for that reason the foreclosure will be set aside.[48] A sale will not

[41] Stuart v. Gay, 127 U. S. 518. A purchaser who has delayed payment of his bid for some time after the confirmation of the sale will not be allowed the earnings of the property in the intervening time. Boyle v. Farmers' L. & Tr. Co. (C. C. A.), 80 Fed. R. 930. The court will not refuse to confirm a sale upon the ground that the purchaser has not made the full cash payment required, when he has paid a substantial sum, and there is no reason to suppose that he will not pay the balance upon the entry of the order of confirmation. Fidelity I., Tr. & S. D. Co. v. Roanoke Iron Co., 84 Fed. R. 752.

[42] Stuart v. Gay, 127 U. S. 518; Camden v. Mayhew, 129 U. S. 73; Central Tr. Co. v. Cincinnati, J. & M. R. Co., 58 Fed. R. 500.

[43] Stuart v. Gay, 127 U. S. 518. See Jaffrey v. Brown, 29 Fed. R. 476.

[44] Terbell v. Lee, 40 Fed. R. 40.

[45] Louisville Tr. Co. v. Louisville, N. A. & C. Ry. Co., 174 U. S. 674; James v. Milwaukee & M. R. Co., 6 Wall. 752.

[46] Whitney v. Nat. Ex. Bank, 84 Fed. R. 377.

[47] Schroeder v. Young, 161 U. S. 334; Seaman v. Riggins, 2 N. J. Eq. 214; Chamberlain v. Larned, 32 N. J. Eq. 295; Woodward v. Bullock, 27 N. J. Eq. 507; Wetzler v. Schaumann, 24 N. J. Eq. 60; Mut. Life Ins. Co. v. Goddard, 33 N. J. Eq. 483. See Gardner v. Schermerhorn, Clarke's Ch. (N. Y.) 101.

[48] Louisville Tr. Co. v. Louisville, N. A. & C. Ry. Co., 174 U. S. 674; C., R. I. & P. R. Co. v. Howard, 7 Wall. 392. This salutary decision of the Supreme Court, in 174 U. S., was severely criticised by Judge Wood in the same case, Farmers' L. & Tr. Co.

be set aside after the confirmation for inadequacy of price, unless the inadequacy is so gross as to shock the conscience.[49] The court may impose as a condition for setting aside a sale that the moving parties first tender to the purchasers repayment of the purchase-money[50] or file a bond with a sufficient surety to pay the costs and expenses of the new sale.[51]

So long as the court keeps control of the case an application to set aside a judicial sale must be made in the foreclosure suit, and an original bill for that purpose will be dismissed unless the circumstances are extraordinary.[52] How long after confirmation such relief can be granted upon motion is a matter which rests largely in the discretion of the court and depends upon the circumstances of the litigation.[53] Where the original suit has been finally determined without leave reserved to move at the foot of the decree, and the next term after the entry of the final decree has expired, relief can only be granted upon a

v. Louisville, N. A. & C. Ry. Co., 103 Fed. R. 110. See pp. 129, 130, where he cites a number of authorities in support of the validity of such a reorganization. It is believed, however, that the decision will stand, and will be a means of preventing many frauds.

In the absence of fraud or insolvency, it seems that the failure of the purchaser at a foreclosure sale to perform a promise to allow second-mortgage bondholders to participate in the reorganization is not a reason for setting aside the sale, but that the only remedy is a suit to enforce the agreement. Robinson v. Iron R. Co., 135 U. S. 522. The court refused to sustain an objection to a bid that it was the intention of the purchasers to form a corporation to create a monopoly. Olmstead v. Distilling & C. F. Co., 73 Fed. R. 44. For a case where a failure to assess the stock in order to prevent a foreclosure was held to be no ground for setting aside a foreclosure sale, see Symmes v. Union Tr. Co., 60 Fed. R. 830. A judgment of foreclosure is not collusive or fraudulent simply because the mortgagor who has no valid defense enters an appearance or files an answer failing to defend the suit before his time to appear expires. Dickerman v. Northern Tr. Co., 176 U. S. 181. Nor is it a ground for setting aside a foreclosure sale that the same persons were interested as officers of corporations or otherwise upon both sides of the suit, where there was no defense and there is no proof of fraud. Leavenworth County v. Chicago, R. I. & P. R. Co., 134 U. S. 688.

[49] Fidelity I., Tr. & S. D. Co. v. Roanoke Iron Co., 84 Fed. R. 752. For a case where the amount of the price was considered and held adequate, see Lake S. I. Co. v. Brown, R. & Co., 44 Fed. R. 589.

[50] Cunningham v. Macon & B. R. Co., 156 U. S. 400.

[51] Chase v. Driver (C. C. A.), 92 Fed. R. 780.

[52] Sayre v. Elyton Land Co., 73 Ala. 87, 96.

[53] Farmers' L. & Tr. Co. v. Bankers' & M. T. Co., 148 N. Y. 315; Brown v. Frost, 10 Paige (N. Y.), 243; Campbell v. Gardner, 11 N. J. Eq. 423.

bill.[54] Where a sale is set aside, a purchaser to whom the property has been delivered is in the position of a mortgagee in possession.[55]

The purchaser at the sale and those who purchase from him take the property subject to the right of the court to modify the decree or the terms of the sale, on appeal, or at the same or the succeeding term of the court.[56] A material change of the terms may be a ground of relieving them from the purchaser.[57] A party bidding at a foreclosure sale makes himself thereby a party to the suit, and subject to the jurisdiction of the court for all orders necessary to compel the perfecting of his purchase.[58] He has the right to be heard on all questions thereafter arising affecting his bid,[59] which are not foreclosed by the terms of the decree of sale, or expressly reserved to him by such decree.[60] Where not concluded by the terms of the decree, any subsequent proceedings to determine in what securities, of diverse value, his bid shall be made good are matters affecting his interests on which he has the right to be heard.[61] From the rulings thereupon, and upon all matters whereby his interests are injuriously affected, he has the right to appeal after the final decree;[62] and he is estopped by them

[54] Sayre v. Elyton Land Co., 73 Ala. 85, 96; *infra*, § 352.

[55] Compton v. Jesup, 167 U. S. 1, 36; Huguley Mfg. Co. v. Galeton Cotton Mills, 94 Fed. R. 269.

[56] Olcott v. Headrick, 141 U. S. 543, 547; *infra*, § 352.

[57] Olcott v. Headrick, 141 U. S. 543, 547. Where purchaser at a foreclosure sale had paid his bid in full, it was held that the court could not compel payment of a judgment rendered against the receiver after the sale had been confirmed. Chicago & O. R. Co. v. McCammon (C. C. A.), 61 Fed. R. 772. But see Southern Ry. Co. v. Bouknight (C. C. A.), 70 Fed. R. 442.

[58] Kneeland v. Am. L. & Tr. Co., 136 U. S. 89, 95; Stuart v. Gay, 127 U. S. 518.

[59] Kneeland v. Am. L. & Tr. Co., 136 U. S. 89, 95; Williams v. Morgan, 111 U. S. 684.

[60] Kneeland v. Am. L. & Tr. Co., 136 U. S. 89, 95; Swann v. Wright's Ex'rs, 110 U. S. 590. Thus, when the rights of the claimants are not adjudicated in the decree of sale, which directs that the purchaser pay all receiver's debts or claims adjudged or to be adjudged as prior in lien or equity to the mortgage, he can contest the rights of such claimants, provided that they have not been previously adjudicated; and he can appeal from the order directing him to pay such a claim. Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257; Lackawanna I. & C. Co. v. Farmers' L. & Tr. Co., 176 U. S. 298.

[61] Kneeland v. Am. L. & Tr. Co., 136 U. S. 89, 95.

[62] Kneeland v. Am. L. & Tr. Co., 136 U. S. 89, 95; Blossom v. Milwaukee & C. R. Co., 1 Wall. 655; Williams v. Morgan, 111 U. S. 684.

in collateral litigation.[63] He cannot appeal from so much of the decree under which he bought as provides that he shall pay a specified claim to which a preference is then or has been subsequently awarded.[64] Where the decree is reversed upon appeal subsequent to the sale, even although no *supersedeas* has been obtained, the court will usually order restitution by the purchaser or his assignee,[65] who is treated as a mortgagor in possession.[66] It has been held that after a decree has been reversed by a court of review for want of jurisdiction and the Circuit Court has been directed to remand the cause, the latter court cannot confirm a sale previously made under its orders by a receiver.[67]

[63] Grape Cr. C. Co. v. Farmers' L. & Tr. Co., 80 Fed. R. 200. See also State of Tennessee v. Quinnard, 80 Fed. R. 829, 835.

[64] Swann v. Wright's Ex'rs, 110 U. S. 590; St. Louis S. W. Ry. Co. v. Stark, 55 Fed. R. 758. See *supra*, § 248; *infra*, § 482.

[65] Robinson v. Alabama & G. Mfg. Co., 67 Fed. R. 189; s. c., 72 Fed. R. 708; s. c. as Huguley Mfg. Co. v. Galeton Cotton Mills, 94 Fed. R. 269. In that case the court overruled the contention that certain actions of the counsel for the mortgagor at the sale estopped his client. But see Phelps v. Elliott, 85 Fed. R. 455, 460; Shultz v. Sanders, 38 N. J. Eq. 154; Watson v. Ulbrich, 18 Neb. 186; Dickinson v. City of Trenton, 38 N. J. Eq. 63; Bailey v. Fanning Orphan School (Ky.), 14 S. W. R. 908. For the measure of damages where the purchaser so far destroyed the property that it could not be returned, see Central Tr. Co. v. Hubinger, 87 Fed. R. 8.

[66] Huguley Mfg. Co. v. Galeton Cotton Mills, 94 Fed. R. 269.

[67] Colburn v. Hill (C. C. A.), 103 Fed. R. 340.

CHAPTER XXIV.

DECREES.

§ 317. Definition and classification of decrees.— A decree is a sentence or order of a court of equity pronounced after a hearing of the points of issue, and corresponds to a judgment of a court of law. A decree should be distinguished from a decretal order. A decretal order is an order in the nature of a decree, made upon motion or petition, either before or after the hearing, or in an independent proceeding.[1] According to the different standpoints from which they may be regarded, decrees are classified, as final or interlocutory; as *in personam* or *in rem;* as absolute, conditional, decrees *nisi*, or decrees in the nature of decrees *nisi*.

§ 318. Final and interlocutory decrees.— Decrees are either final or interlocutory. These terms are used with different meanings in the English practice and in that in the courts of the United States. A final decree in the English Chancery was a complete determination of every question arising in a cause.[1] An interlocutory decree was one which reserved the further consideration of any question arising in a cause till a future hearing.[2] In strictness, moreover, every decree was said to be interlocutory until it was signed and enrolled.[3] In England, an appeal lay from an interlocutory as well as from a final decree;[4] but, under the Judiciary Acts, before that of March 3, 1891, only final decrees of a Federal court could be brought to a court of appeal for revision.[5] On account of the inconvenience which would have followed, had the old definition been applied to the term used in this statute, the Federal courts have refused to follow the English Chancery in this respect. As far as appeals are concerned, a decree is considered final which decides the right to property, and orders that it be sold or delivered to a party; or creates a lien upon prop-

§ 317. [1] Barb. Ch. Pr. 337.

§ 318. [1] Seton's Decrees (4th ed.), 2.

[2] Seton's Decrees (4th ed.), 2; Richmond v. Atwood (C. C. A.), 52 Fed. R. 10, 21.

[3] Forum Romanum, 183; Seton's Decrees (4th ed.), 2.

[4] Forgay v. Conrad, 6 How. 201, 205.

[5] U. S. R. S., §§ 631, 692.

erty by the issue of receiver's certificates or otherwise; or directs a specific sum of money to be paid to a party either by another person or out of a fund in court, provided that the successful party is entitled to compel its immediate execution,[6] even though the consideration of other matters arising upon the pleadings is reserved "for further consideration" in it.[7] A decree is final which settles all the rights of the parties involved in the pleadings, though it gives leave to either one of them to apply at the foot of the decree "in relation to any matter not finally determined by it."[8] A decree dismissing a bill with costs to be subsequently taxed was held to be a final decree, although a judgment for the costs was subsequently entered after their taxation.[9] A decree dismissing a bill as to all matters except one severable from the rest was held to be a final decree as regards the matters which it then determined.[10] All other decrees which reserve any question for the court's further decision, even though they direct money to be paid into court,[11] or property to be delivered to a new trustee appointed by the court,[12] or dissolve an injunction,[13] or punish a party for contempt,[14] or direct

[6] Taney, C. J., in Forgay v. Conrad, 6 How. 201, 204; Michoud v. Girod, 4 How. 503; Ray v. Law, 3 Cranch, 179; Whiting v. Bank U. S., 13 Pet. 6; Wabash & E. C. Co. v. Beers, 1 Black, 54; Bronson v. Railroad Co., 2 Black, 524; Milwaukee & M. R. Co. v. Soutter, 2 Wall. 440; Thomson v. Dean, 7 Wall. 342; Railroad Co. v. Bradleys, 7 Wall. 575; Stovall v. Banks, 10 Wall. 583; French v. Shoemaker, 12 Wall. 86; Marin v. Lalley, 17 Wall. 14; Trustees v. Greenough, 105 U. S. 527; Farmers' L. & Tr. Co., Petitioner, 129 U. S. 206; Lewisburg Bank v. Sheffey, 140 U. S. 445. So is a decree directing the payment of a claim out of the proceeds of a future sale. Central Tr. Co. v. Grant Locomotive Works, 135 U. S. 207. See final chapter on Writs of Error and Appeals.

[7] St. Louis, I. M. & S. R. Co. v. Southern Ex. Co., 108 U. S. 24; Mo., K. & T. R. Co. v. Dinsmore, 108 U. S. 30; Lewisburg Bank v. Sheffey, 140 U. S. 445.

[8] French v. Shoemaker, 12 Wall. 86.

[9] Fowler v. Hamill, 139 U. S. 549.

[10] Hill v. Chicago & E. R. Co., 140 U. S. 52. But see Keystone Iron Co. v. Martin, 132 U. S. 91.

[11] Forgay v. Conrad, 6 How. 201; Beebe v. Russell, 19 How. 283; Louisiana Bank v. Whitney, 121 U. S. 284. But see Wabash & E. C. Co. v. Beers, 1 Black, 54.

[12] Pulliam v. Christian, 6 How. 209. As to receiverships before 31 St. at L. 660, see Tornanses v. Melsing (C. C. A.), 106 Fed. R. 775; Re McKenzie, 180 U. S. 536; Forgay v. Conrad, 6 How. 201; Beebe v. Russell, 19 How. 283; Hentig v. Page, 102 U. S. 219; but see Wabash & E. C. Co. v. Beers, 1 Black, 54.

[13] Young v. Grundy, 6 Cranch, 51; Moses v. Mayor, 15 Wall. 387; Verden v. Coleman, 18 How. 86; Knox County v. Harshman, 132 U. S. 14.

[14] Hayes v. Fischer, 102 U. S. 121.

a sale, but do not sufficiently specifically determine the property to be sold to warrant an immediate sale,[15] or direct a sale, but do not appoint the time of sale,[16] or confirm a report of commissioners to locate boundaries and direct them to determine and make the boundary lines in accordance with such report and then to make a further report of their findings,[17] are, it seems, interlocutory decrees from which no appeal can be taken under the Judiciary Acts; although, if the decision of the court in making them was erroneous, the final decree may be reversed on that account upon an appeal by a party who was thereby injured,[18] or on the entry of the final decree the court which made them may correct the error.[19] It has been held that the Federal court should not enjoin from acting under or otherwise interfere with the interlocutory decree of another court, and that the proper remedy is an application to the court which made the decree for a modification of the same,[20] at least when such decree is not a contempt of the Federal court.

§ 319. Decrees in personam.—Decrees are either *in personam* or *in rem*. Decrees *in personam* are those which contain a command to one of the parties to a suit in equity. Decrees *in rem* are such as, without containing a command to either of the parties, transfer the title to property. Decrees *in personam* may direct the performance of, or the abstention from, an act or acts. The ordinary decree of a court of equity is a decree *in personam*. Such a decree may be made even though it directs the performance of or abstention from an act, or directs a transfer, or otherwise affects the title to property beyond the jurisdiction of the court.[1] Where in order to obtain the relief

[15] Railroad Co. v. Swasey, 23 Wall. 405. See McGourkey v. Toledo & I. C. Ry. Co., 146 U. S. 536.

[16] Parsons v. Robinson, 123 U. S. 112; Burlington, C. R. & N. Ry. Co. v. Simmons, 123 U. S. 52.

[17] Iowa v. Illinois, 151 U. S. 238.

[18] Buckingham v. McLean, 13 How. 150.

[19] Iowa v. Illinois, 151 U. S. 238; *infra*, § 350.

[20] Furnald v. Glenn (C. C. A.), 64 Fed. R. 49.

§ 319. [1] Arglasse v. Muschamp, 1 Vern. 75; Carron I. Co. v. Maclaren, 5 H. L. C. 416; Muller v. Dows, 94 U. S. 444; Wheeler v. McCormack, 4 Fish. Pat. Cas. 433; s. c., 8 Blatchf. 267; Lynde v. Columbus, C. & I. C. Ry. Co., 57 Fed. R. 993, 996. For an excellent review of the authorities, see the learned opinion of Davies, J., in Gardner v. Ogden, 22 N. Y. 327. See also Carpenter v. Strange, 141 U. S. 87. A statute provides that "the original jurisdiction of the Circuit Court for the Southern District of New York shall not be construed

sought it would be necessary for the court to take possession by its officers of land beyond its territorial jurisdiction, it has been said that such a decree should not be granted.[2] Thus, it seems that the court will not decree a partition of land beyond the jurisdiction, since no commission appointed by it could have authority to act there;[3] but it may decree specific performance of a contract, or the foreclosure of a mortgage affecting land no matter where it may be situated.[4] It seems that it cannot direct a sale in another State.[5] It has been held in England that the court will make no decree in a suit between two foreigners not residents of the country concerning a contract made or land situated elsewhere.[6] And a Georgia case holds that a court of equity will not compel a corporation to perform a contract to open ditches and keep fences in repair in a State where it has no corporate existence.[7] It often happens, however, that the court can do a thing itself more easily and effectively than it can compel it to be done by the party concerned, as, for example, when it wishes to sell property or to cancel an instrument in writing, and it then will perform that duty by means of a master or receiver.[8] When all the defendants are within the jurisdiction, such a decree is usually accompanied by a command to them to confirm the sale or other action of the court, or to assist in the transaction directed by the decree. When a defendant is beyond the jurisdiction, the court sometimes acts by a decree *in rem*.

to extend to causes of action arising within the Northern District of said State." U. S. R. S., § 657; Hodge v. Hudson River R. Co., 3 Fish. Pat. Cas. 410; s. c., 6 Blatchf. 85; Locomotive E. S. T. Co. v. Erie R. Co., 10 Blatchf. 292; Black v. Thorne, 10 Blatchf. 66; *supra*, § 28.

[2] Muller v. Dows, 94 U. S. 444, 449; Macgregor v. Macgregor, 9 Iowa, 65; Glen v. Gibson, 9 Barb. (N. Y.) 634; Story's Eq. Jur., § 1292; 2 Spence, 8, n. (d); Smith's Eq. 30; Bispham's Eq., § 47.

[3] 2 Spence, 8, n. (d); Story's Eq. Jur., § 1292; Smith's Eq. 30; Bispham's Eq., § 47.

[4] Penn v. Lord Baltimore, 1 Ves. Sen. 444; Massie v. Watts, 6 Cranch, 148; Muller v. Dows, 94 U. S. 444; McElrath v. Pittsburg & S. R. Co., 5 Pa. St. 189.

[5] Lynde v. Columbus, C. & I. C. Ry. Co., 57 Fed. R. 993; Farmers' L. & Tr. Co. v. Postal Tel. Co., 55 Conn. 334; s. c., 11 Atl. R. 184; Carpenter v. Strange, 141 U. S. 87, 106; Mercantile Tr. Co. v. Kanawha & O. Ry. Co., 39 Fed. R. 337; In re Anderson, 94 Fed. R. 487; *supra*, § 316.

[6] Matthaei v. Galitzin, L. R. 18 Eq. 340; Blake v. Blake, 18 W. R. 944.

[7] Port Royal R. Co. v. Hammond, 58 Ga. 523.

[8] Deck v. Whitman, 96 Fed. R. 878; Langdell's Eq. Pl., § 44. See *infra*, § 349.

§ 320. Decrees in rem.— A decree *in rem* in a court of equity is one that determines the title to or an interest in real or personal property within the territorial jurisdiction of the court, without having any other effect upon a defendant who dwells beyond that jurisdiction and has not been served with process within it. Such an equitable decree must be distinguished from the decrees *in rem* of a court of admiralty, which establish a title conclusively against all the world; whereas it is only binding upon the parties to the action in which it is rendered. Such decrees were formerly very rare.[1] In the Federal courts of equity they are purely statutory, and the power of those courts to make them depends entirely upon a strict compliance with the provisions of the statute.[2] Whether or not, under this statute or otherwise, a decree can be made and enforced which requires the specific performance of a contract for the conveyance of property within the court's jurisdiction against a person not served there with process, has never been decided.[3] Where the State statute authorized such a decree it was followed by the Federal court.[4]

§ 321. Absolute and conditional decrees.— Decrees are either absolute, conditional, *nisi*, or in the nature of decrees *nisi*. An absolute decree is one that takes effect immediately upon its entry and is dependent for its enforcement upon no condition, and is not subject to be defeated by the occurrence of any subsequent event. A conditional decree is one that by its terms is not to take effect unless something shall be done by the party to whom relief is given by it. Under the present state of the authorities, it would be rash to attempt to lay down a rule as to when a conditional decree will be granted, and when the plaintiff will be denied relief unless he has made a specific offer or waiver in his bill.[1] The following are a few of the cases where a conditional decree has been granted. An express company has been granted a decree compelling a railroad company to carry freight for it, upon condition that it

§ 320. [1] But see Anon., 1 Atk. 18.

[2] U. S. R. S., § 738; Act of March 3, 1875, ch. 137, § 8 (18 St. at L. 472). See Grove v. Grove, 98 Fed. R. 855; *supra*, § 97.

[3] See Ward v. Arredondo, Hopk. Ch. (N. Y.) R. 213; Anon., 1 Atk. 18; Rourke v. McLaughlin, 38 Cal. 196; Matteson v. Scofield, 27 Wis. 671; Story's Eq. Jur., § 744, n. 3.

[4] Single v. Scott P. Mfg. Co., 55 Fed. R. 553.

§ 321. [1] See Moore v. Crawford, 130 U. S. 122, 140.

should give the latter a bond to pay such charges as the court should subsequently consider reasonable.[2] A decree for the redemption of a mortgage is upon condition that the plaintiff pay the balance reported due from him within six months, which it seems must be lunar not calendar months, after the report, in default whereof the plaintiff's bill against the defendant is from thenceforth to stand dismissed out of court with costs.[3] Upon default, a final order, which will be granted as of course, is necessary to dismiss the bill.[4] A decree allowing a junior incumbrancer to redeem may be upon condition that he pay off a prior incumbrance, and repay to its holder money paid by him in discharging still prior incumbrances, and for taxes, repairs, and insurance upon the mortgaged premises.[5] Similarly, a decree upon a bill by a purchaser for the specific performance of an agreement for the sale of an estate may appoint a time and place for the payment of the purchase-money, with interest if any be due, and direct that in default of payment the bill be dismissed with costs.[6] A decree for an accounting should always contain a submission by the plaintiff to account.[7] It has been made a condition precedent to the entry of a decree to enjoin the infringement of a patent, that the complainant first file in the Patent Office a disclaimer of those of the claims in the patent to which he is not entitled.[8] For conditions of sale in suits to foreclose railway mortgages see the preceding section upon sales by masters.[9]

§ 322. **Decrees nisi.**— A decree *nisi* is one giving a defendant a certain specified time within which to show cause against a decree or to perform some other act in relation thereto, in default whereof it shall be absolute against him. Such a decree is made against an infant or a mortgagor, or the latter's assigns. According to the English rule, every decree against an infant defendant which requires some act to be performed by him,[1] or which directs a conveyance or a foreclosure of his

[2] Southern Exp. Co. v. St. Louis, I. M. & S. R. Co., 10 Fed. R. 210; reversed Express Cases, 117 U. S. 1.

[3] Seton on Decrees, 140; Waller v. Harris, 7 Paige (N. Y.), 167.

[4] Seton on Decrees, 178.

[5] McCormick v. Knox, 105 U. S. 122.

[6] Lowther v. Andover, 1 Bro. C. C. 396.

[7] Fowler v. Wyatt, 24 Beav. 232; Seton on Decrees (4th ed.), 775.

[8] Sessions v. Romadka, 21 Fed. R. 124, 133; Hake v. Brown, 37 Fed. R. 783; Electrical Acc. Co. v. Julien El. Co., 38 Fed. R. 117.

[9] *Supra*, § 316.

§ 322. [1] Walsh v. Trevannion, 16 Simons, 178; Eyre v. Countess of

interest in any real estate, must contain a clause giving him an opportunity to show cause against it after he has come of age.[2] Where a sale of land is directed by such a decree, it usually contains a direction that, in the mean time, a purchaser under the sale shall hold and enjoy the estate against the infant until he attains full age;[3] and the court so far protects a purchaser that it will not permit his title to be affected by a mere irregularity in the decree.[4] Where a decree directed a conveyance by both adult and infant parties, as in a partition suit, by the English practice it would not direct a conveyance by any till the infant was of age and had had an opportunity to show cause against the decree, and, in the mean time, the decree would only extend so far as to give possession in accordance with the court's decision, and to order enjoyment accordingly until effectual conveyances could be made.[5] It seems that in no other instances will a decree *nisi* be entered against an infant defendant, although there is some doubt upon this point.[6] In a few exceptional cases, when an infant plaintiff in his bill exercised an election between two conflicting claims, the court has allowed him a day after he became of age in which to show cause against it.[7] The usual form of the *nisi* clause in such a decree is as follows: "And this decree is to be binding on the defendant, the infant, unless on being served, after he shall have attained the age of twenty-one years, with subpœna to show cause against this decree, he shall within six months from the service of such subpœna show unto this court good cause to the contrary."[8] Such a clause should be inserted in the order for making a decree of foreclosure absolute, as well as in the decree.[9] The omission of a similar clause in such a decree is

Shaftsbury, 2 P. Wms. 102; Sheffield v. Duchess of Buckingham, 1 West, 682; Thoroton v. Blackborne, 2 W. Kel. 7; Seton on Decrees (4th ed.), 712, 713.

[2] Williamson v. Gordon, 19 Ves. 114; Mallack v. Galton, 3 P. Wms. 352; Newbury v. Marten, 15 Jur. 166; Mills v. Dennis, 3 J. Ch. (N. Y.) 367; Seton on Decrees (4th ed.), 714. But see Croxon v. Lever, 12 W. R. 237.

[3] Powell v. Powell, Mad. & Geld. 53.

[4] Bennet v. Hamill, 2 Sch. & Lef. 566.

[5] Agar v. Fairfax, 17 Ves. 533, 554; Atty. Gen. v. Hamilton, 1 Madd. 214.

[6] Seton on Decrees (4th ed.), 714; Eyre v. Countess of Shaftsbury, 2 P. Wms. 102; Sheffield v. Duchess of Buckingham, 1 West, 682. See Kingsbury v. Buckner, 134 U. S. 650.

[7] Gregory v. Molesworth, 3 Atk. 626; Sir John Napier v. Lady Effingham, 2 P. Wms. 401; Lord Brook v. Lord Hertford, 2 P. Wms. 518; Taylor v. Philips, 2 Ves. Sen. 23.

[8] Seton on Decrees (4th ed.), 711.

[9] Williamson v. Gordon, 19 Ves. 114.

error.[10] The six months after the service of process within which cause must be shown must be, it seems, lunar not calendar months.[11] At the expiration of them and upon proof of the requisite facts, an order making the original decree absolute should be entered.[12] A decree for a foreclosure should also be *nisi*, providing for either a strict foreclosure or a foreclosure sale, unless the whole amount due shall be paid within a reasonable time, usually six lunar months, from the time of the conclusion of the accounting and the certificate of what is due under the mortgage.[13] An omission of such clause is error.[14] At the expiration of the allotted time, if the debt be still unpaid, the plaintiff should obtain an order confirming the foreclosure or directing the sale.[15] The time for payment may always, even after a peremptory order for a sale,[16] be enlarged, upon terms, which usually are that the defendant give good security to pay the amount due, with interest and costs in full.[17] A decree of foreclosure absolute may also be reopened;[18] but it has been said that this can only be done when it has been obtained by fraud or under circumstances of oppression.[19] The Supreme Court has held that "what is indispensable to such a decree is, that there should be declared the fact, nature, and extent of the default which constituted the breach of the condition of the mortgage, and which justified the complainant in filing his bill to foreclose it, and the amount due on account thereof, which, with any further sums subsequently accruing,

[10] Coffin v. Heath, 6 Met. (Mass.) 76.

[11] Seton on Decrees (4th ed.), 711.

[12] Ibid.

[13] Clark v. Reyburn, 8 Wall. 318; Howell v. Western R. Co., 94 U. S. 463; Chicago & V. R. Co. v. Fosdick, 106 U. S. 47; Perine v. Dunn, 4 J. Ch. (N. Y.) 140. Twenty days has been held insufficient. Chicago & V. R. Co. v. Fosdick, 106 U. S. 47. In one case it was held that eighteen months should be allowed. American L. & Tr. Co. v. Union Depot Co., 80 Fed. R. 36. In another, four months was held to be sufficient. Columbia F. & Tr. Co. v. Kentucky Union Ry. Co. (C. C. A.), 60 Fed. R. 794.

[14] Clark v. Reyburn, 8 Wall. 318.

[15] Seton on Decrees (4th ed.), 1091; Chicago & V. R. Co. v. Fosdick, 106 U. S. 47, 71; Sheriff v. Sparks, West, 180; Senhouse v. Earl, 2 Ves. Sen. 450; Whiting v. Bank of U. S., 13 Pet. 6.

[16] Edwards v. Cunliffe, 1 Madd. 287; Seton on Decrees (4th ed.), 1088.

[17] Monkhouse v. Corp. of Bedford, 17 Ves. 380; Geldard v. Hornby, 1 Hare, 251; Holford v. Yate, 1 K. & J. 677; Coombe v. Stewart, 18 Beav. 11.

[18] Campbell v. Holyland, L. R. 7 Ch. D. 166; Seton on Decrees (4th ed.), 1088.

[19] Patch v. Ward, L. R. 3 Ch. 203, 212; Seton on Decrees (4th ed.), 1098.

and having become due, according to the terms of the security, the mortgagor is required to pay within a reasonable time, to be fixed by the court, and which if not paid, a sale of the mortgaged premises is directed.[20] By rule, "in suits in equity for the foreclosure of mortgages in the Circuit Courts of the United States, or in any court of the Territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of the Supreme Court regulating the equity practice, when the decree is solely for the payment of money."[21] It has been held that this rule obviates the necessity of a prayer in the bill for such relief, although it is the better practice to pray for it specifically.[22]

[20] Chicago & V. R. Co. v. Fosdick, 106 U. S. 47, 70, per Matthews, J. But see Grape C. C. Co. v. Farmers' L. & Tr. Co., 63 Fed. R. 893, 986; *supra*, § 316, note 4.

[21] Equity Rule 92; Northwestern M. L. I. Co. v. Keith (C. C. A.), 77 Fed. R. 874.

[22] Seattle, L. S. & E. Ry. Co. v. Union Tr. Co. (C. C. A.), 79 Fed. R. 179. The court may, however, where the mortgage does not provide that the principal shall become due upon a default in interest, direct that the property be sold as an entirety and that the principal as well as the interest be paid out of the proceeds. In such a case it is a fatal error to declare in the decree of foreclosure that the whole debt is due. The power to treat the principal as due upon a default in interest is not implied by a provision giving the trustee the right to take possession upon such a default, to apply the income on account of principal after payment of overdue interest, and to cause the property to be sold as an entirety; where the mortgage also provides for the surrender by the trustee of possession upon payment of arrears of interest, costs and expenses at any time before the sale. Grape C. C. Co. v. Farmers' L. & Tr. Co. (C. C. A.), 63 Fed. R. 891. A mortgage and the bonds secured thereby are to be construed together, and a provision in a mortgage concerning the method of distribution in case of a foreclosure, which is not contained in the bonds, will control. Low v. Blackford (C. C. A.), 87 Fed. R. 892. It has been said that if the trustee improvidently declares the principal due, the court may set that declaration aside. Mercantile T. Co. v. Baltimore & O. R. Co., 89 Fed. R. 606, 610. A decree directing that the surplus upon a foreclosure sale after payment of preferential claims should be divided equally among the bondholders was held not to deprive the coupon holders of a preference given them in the mortgage. Burke v. Short, 79 Fed. R. 6. A provision that the mortgagor shall remain in possession for six months after default in interest was held not to preclude him from bringing a foreclosure suit immediately upon the default. Farmers' L. & Tr. Co. v. Winona S. W. Ry. Co., 59 Fed. R. 957. Such and similar provisions are usually construed as cumulative to the ordinary remedy

The rule does not authorize the entry of a decree for the balance of principal not due [23] on the foreclosure of a mortgage for the failure to pay interest, unless the mortgage so provides. A State statute giving mortgagors a right of redemption within a certain time after a mortgage sale, will in all cases be followed by the Federal courts, since it establishes a rule of property.[24] In the absence of such a statute there is no right of redemption after the sale under a decree of foreclosure has been confirmed.[25]

§ 323. Decrees in the nature of decrees nisi.— Decrees in the nature of decrees *nisi* are decrees taking a bill against a defendant as confessed, and decrees under the statute affecting property within, and against a defendant without, the jurisdiction of the court. Decrees taking bills as confessed are described in chapter VII. The cases where a decree against a defendant not served with process can be entered under the act of March 3, 1875, have been already described.[1] Any defendant or defendants to such a statutory decree "not actually personally notified" of the suit, in accordance with the provisions of the statute, may, at any time within one year after final decree, enter his appearance in said suit, and thereupon the court must make an order setting aside the decree therein, and permitting such defendant to plead on payment of such costs as the court shall deem just; and thereupon the suit is proceeded with to final judgment according to law.[2]

§ 324. Time of entry of decree.— A decree can regularly be entered only during a term of the court.[1] The court has

of a foreclosure suit upon a breach of the condition of the trust deed or mortgage. Central Tr. Co. v. Worcester C. Mfg. Co. (C. C. A.), 93 Fed. R. 712; Farmers' L. & Tr. Co. v. Chicago & N. P. R. Co., 61 Fed. R. 543; Mercantile Tr. Co. v. Chicago, P. & St. L. Ry. Co., 61 Fed. R. 372; Pennsylvania Co. for Ins. etc. v. Philadelphia & R. R. Co., 69 Fed. R. 482. It has been held that the acceptance by the mortgagee of interest paid by the receiver of the property appointed in his suit for foreclosure is not a waiver of his right to continue the suit when other instalments of interest remain due and unpaid. American L. & Tr. Co. v. Union Depot Co., 80 Fed. R. 36.

[23] Ohio Cent. R. Co. v. Central Tr. Co., 133 U. S. 83.

[24] Brine v. Insurance Co., 96 U. S. 627; Orvis v. Powell, 98 U. S. 176; Hammock v. Farmers' L. & Tr. Co., 105 U. S. 77; Mason v. N. W. Ins. Co., 106 U. S. 163; Conn. Mut. L. Ins. Co. v. Cushman, 108 U. S. 51.

[25] Parker v. Dacres, 130 U. S. 43.

§ 323. [1] *Supra*, § 97.

[2] U. S. R. S., § 738; 18 St. at L. 472.

§ 324. [1] Griswold v. Hill, 1 Paine, 483.

power to allow a decree to be entered even in vacation as of a previous term, *nunc pro tunc*.[2] Such leave will always be granted when the delay was caused by the action of the court.[3]

§ 325. **Frame of decree.**— Decrees originally always consisted of three, and sometimes of four, parts. These were: the date and title; the recitals; the declaratory part, if that were required; and the ordering part.[1] A decree usually begins with a recital of the day of the month and year when it was pronounced,[2] and of the title of the cause, in which the parties should have the same designations that were given them in the bill.[3] Next always followed, formerly, a recital of the pleadings, evidence, and former proceedings in the cause.[4] The equity rules, however, provide that "in drawing up decrees and orders, neither the bill nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: 'This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz.' "[5] When a decree is entered by consent, the fact that consent was given should be stated. The proper place for such a statement is ordinarily in the recitals, unless consent be only given to certain directions, when the statement of the consent should immediately precede such directions.[6] It has been said also that it should appear affirmatively upon the face of the decree, that the defendant was properly served with process.[7] The declaratory part of a decree, which if desired at all should be next inserted, contains a declaration of matters of fact, or of the rights of one or more of the parties to the cause, or a statement of the reason for the decree or any part thereof. This statement of reasons is not usual,[8] although its utility has been noticed,[9]

[2] Gray v. Brignardello, 1 Wall. 627; Griswold v. Hill, 1 Paine, 483.

[3] Gray v. Brignardello, 1 Wall. 627.

§ 325. [1] Daniell's Ch. Pr., ch. xxv.

[2] Whitney v. Belden, 4 Paige (N. Y.), 140; Barclay v. Brown, 7 Paige (N. Y.), 245.

[3] Daniell's Ch. Pr., ch. xxv.

[4] Seton on Decrees (4th ed.), 9–19.

[5] Rule 86.

[6] Seton on Decrees (4th ed.), 1535; Bartlett v. Wood, 9 W. R. 817.

[7] Allen v. Blunt, 1 Blatchf. C. C. 480.

[8] Ex parte Earl of Ilchester, 7 Ves. 348, 373; Seton on Decrees (4th ed.), 19.

[9] Bax v. Whitbread, 16 Ves. 15, 24;

and it is sometimes adopted.[10] Instances of declarations of matters of fact are the existence and validity of a will or other instrument,[11] and the validity of a patent.[12] So, whenever there are interfering patents, and a suit is brought by any person interested in any one of them, or in the working of any one of them, to obtain relief against the interfering patentee, the court, on notice to adverse parties, and other due proceedings had according to the course of equity, may adjudge and declare either of the patents void in whole or in part, or inoperative, or invalid in any particular part of the United States, according to the interest of the parties in the patent or the invention patented; but no such judgment or adjudication can affect the right of any person, except the parties to the suit and those deriving title under them subsequent to the rendition of such decree.[13] Where a party establishes his right to property, the direction to transfer it to him is often preceded by a declaration of his title.[14] The court will not thus decide rights as between co-defendants unless a cross-bill has been filed for that purpose,[15] or it be necessary in order to determine the rights of the plaintiff, or possibly when the evidence is clear and the case between them ripe for decision;[16] and language in a decree broad enough to determine such rights will usually be construed as merely determining rights as between the plaintiff and the defendants, if no controversy between the defendants appears upon the pleadings.[17] The court will not make a declaration of mere future rights,[18] nor as to the rights of parties upon a contingency that has not

Gordon v. Gordon, 3 Swanst. 400, 478. Recitals in a decree of foreclosure of previous proceedings in the suit are sufficient *prima facie* evidence of such proceedings. Koons v. Beyson (C. C. A.), 69 Fed. R. 297.

[10] Gordon v. Gordon, 3 Swanst. 400, 478; Jenour v. Jenour, 10 Ves. 573; Atty. Gen. v. Clapham, 4 De G. M. & G. 591, 607; Austin v. Austin, 11 Jur. (N. S.) 536.

[11] Seton on Decrees (4th ed.), 19, 20.

[12] Union S. R. v. Mathiesson, 3 Cliff. 146.

[13] U. S. R. S., § 4918. See Foster v. Lindsay, 3 Dill. 126; Pentlarge v. Pentlarge, 19 Fed. R. 817; s. c., 22 Fed. R. 412.

[14] Jenour v. Jenour, 10 Ves. 562; Seton on Decrees (4th ed.), 20.

[15] Thomas v. Lloyd, 25 Beav. 620; Graham v. Railroad Co., 3 Wall. 704; Seton on Decrees (4th ed.), 20. See §§ 170, 171.

[16] Jolly v. Arbuthnot, 4 De G. & J. 224, 245; Gresley v. Mousley, 4 De G. & J. 78, 99; Cottingham v. Earl of Shrewsbury, 3 Hare, 627; Seton on Decrees (4th ed.), 20.

[17] Graham v. Railroad Co., 3 Wall. 704.

[18] Cross v. De Valle, 1 Wall. 5; Lady

happened,[19] nor, it was formerly held, as to mere legal rights;[20] unless such a determination is indispensable to the declaration of the present equities of the parties. A declaration that a deed to property beyond the jurisdiction of the court is fraudulent and void is of no effect unless accompanied by a direction that a party to the suit execute a reconveyance or deliver up the deed for cancellation, and compliance is made with such direction.[21] It seems that the court should not make a declaration of the rights of the parties in a decree taken *pro confesso* or upon a defendant's default at the hearing.[22] The conclusion of a decree is its ordering or mandatory part, which contains the specific directions of the court upon the matter before it.[23] As these directions vary according to the nature of the case before the court, it would be impossible to lay down any definite rule concerning them. Nothing is more elastic and less arbitrary than this part of a decree in equity. The directions to the different parties may be separate, reciprocal, direct, or inverted, as long as they are not inconsistent.[24] If there be several plaintiffs suing jointly, the decree may be joint or several, in conformity with their respective rights, as finally determined; and if a number of defendants, a single direction may be given to all, or a separate direction, or even a separate decree against each.[25] Certain general rules governing particular kinds of decrees may, however, be stated. If the decree be for the performance of any specific act except the payment of money, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree must prescribe the time within which the act must be done.[26] Decrees for an account should always specify the

Langdale v. Briggs, 4 W. R. 703; Fletcher v. Bealey, 33 W. R. 745; City Ry. Co. v. Citizens' Street R. Co., 166 U. S. 557, 570; Seton on Decrees (4th ed.), 20.

[19] Dowling v. Dowling, L. R. 1 Ch. 612; Seton on Decrees (4th ed.), 20.

[20] Birkenhead Docks v. Laird, 4 De G. M. & G. 732; Webb v. Byng, 8 De G. M. & G. 633; Seton on Decrees (4th ed.), 20.

[21] Carpenter v. Strange, 141 U. S. 87, 106; *supra*, § 819.

[22] Jennings v. Simpson, 1 Keen, 404.

[23] Daniell's Ch. Pr., ch. xxv.

[24] Lingan v. Henderson, 1 Bland (Md.), 236, 275; Hodges v. Mullikin, 1 Bland (Md.), 503, 507; Owings' Case, 1 Bland (Md.), 370, 404.

[25] Lingan v. Henderson, 1 Bland (Md.), 236, 256; Hodges v. Mullikin, 1 Bland (Md.), 503, 507; Quarles v. Quarles, 2 Munford (Va.), 321; Elliott v. Pell, 1 Paige (N. Y.), 263.

[26] Rule, 8.

time from which the account is to be taken.[27] "Every decree for an account of the personal estate of a testator or intestate shall contain a direction to the master to whom it is referred to take the same, to inquire and state to the court what parts, if any, of such personal estate are outstanding or undisposed of, unless the court shall otherwise direct."[28] The old form of a decree to set aside a forged instrument was that the document "be cut, damned, and canceled."[29] By statute, when a Federal court of equity awards an injunction against the infringement of a patent, it may assess the damages the complainant has sustained by the injunction, as well as compel an account of the profits,[30] and it has the power to award treble damages,[31] but not to award treble profits.[32] In suits in equity for the foreclosure of mortgages, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same as is provided in the eighth equity rule.[33] Upon the foreclosure of a railroad mortgage in a Federal court it is customary to insert in the decree a direction that the purchaser pay all valid claims against the receiver and such indebtedness of the mortgagor as has a preference over the mortgage debt.[34] It has been held that such claims cannot be enforced by the State courts against the purchaser,[35] but that suits upon them must be prosecuted in the Federal court upon the common-law or equity side, as the nature of the case requires;[36] and that, after their adjudication, the creditor must bring his judgment

[27] Cummins v. Adams, 2 Irish Eq. 393.

[28] Rule 73.

[29] Bishop of Winchester v. Fournier, 2 Ves. Sen. 445; Fitton v. Earl of Macclesfield, 1 Vern. 267, 292; Seton on Decrees (4th ed.), 1346.

[30] U. S. R. S., § 4921.

[31] U. S. R. S., §§ 4921, 4917; Livingston v. Woodworth, 15 How. 546; Zive v. Peck, 13 Fed. R. 475; Lyon v. Donaldson, 34 Fed. R. 789; Welling v. La Bau, 35 Fed. R. 302; Guyon v. Serrell, 1 Blatchf. 244; Peek v. Frame, 9 Blatchf. 194; Saunders v. Logan, 2 Fish. 167; Schwanzel v. Holenshade, 3 Fish. 196; Brodie v. Ophir Silver Mining Co., 4 Fish. 37.

[32] Covert v. Sargent, 42 Fed. R. 298; Campbell v. James, 5 Fed. R. 807.

[33] Equity Rule 92; Northwestern M. L. I. Co. v. Keith (C. C. A.), 77 Fed. R. 874; *supra*, § 323.

[34] Jesup v. Wabash, St. L. & P. Ry. Co., 44 Fed. R. 663; Thompson v. Northern Pac. Ry. Co., 93 Fed. R. 384, 388.

[35] Jesup v. Wabash, St. L. & P. Ry. Co., 44 Fed. R. 663.

[36] Thompson v. Northern Pac. Ry. Co., 93 Fed. R. 384.

into the foreclosure suit, where it will be enforced as a lien upon the property in the hands of the purchaser.[37] Where Bradley was trustee under two deeds of trust, a decree appointing Johnson a trustee in his place "in the deed of trust," without specifying which deed of trust, was held void for uncertainty.[38]

§ 325a. Motions at the foot of a decree.— It is usual where a suit involves the distribution of a fund in court, or otherwise affects the rights of numerous persons, to add a clause to the decree giving the right to the parties to apply to the court for other orders or direct "at the foot of the decree." It has been held that this gives no right to move to set aside a sale which has been confirmed; but that it is limited to applications for such orders as may be necessary in the distribution of the funds concerning which there is a dispute between different persons, both claiming under the decree or for the delivery of the possession of the property affected.[1]

§ 325b. Enrollment of decree.— By the former chancery practice, a decree did not, strictly speaking, become a record of the court until it had been enrolled; and although the court, after it had been entered, treated it as a foundation for ulterior proceedings, it was not considered to be of a nature sufficiently permanent to be entitled in other courts to the same attention that is paid by one court of record to the records of other courts of the same nature.[1] Until the enrollment the decree was considered to be entered provisional and interlocutory, so that it could be altered by the court itself at a rehearing;[2] but it seems that an appeal to the House of Lords lay before the

[37] Thompson v. Northern Pac. Ry. Co., 93 Fed. R. 884, 888; *supra*, § 816. Where it was claimed that a fund due from a defendant had been assigned and notices of attachment had been served, it was held that the decree should provide for the payment of the fund into court, and that the defendant might protect itself by bringing in the parties claimant. Mundy v. Louisville & N. Ry. Co. (C. C. A.), 67 Fed. R. 633.

[38] Shepherd v. Peffer, 133 U. S. 626.

§ 325a. [1] Wetmore v. St. Paul & P. Ry. Co., 3 Fed. R. 177.

§ 325b. [1] Daniell's Ch. Pr. (1st Am. ed.) 1220, 1221. Although a decree which had not been signed and enrolled could not be pleaded in bar, it was held in New York that it could be set up by answer. Davoue v. Fanning, 4 J. Ch. (N. Y.) 199; Lyon v. Talmage, 14 J. (N. Y.) 501.

[2] Daniell's Ch. Pr. (1st Am. ed.) 1221*m*, 1222, 1224, criticised the *dictum* of Lord Brougham in Parker v. Downing, 1 M. & K. 634.

enrollment.[3] A decree could be enrolled by a defendant as well as by a plaintiff, and at any time, notwithstanding an abatement of the suit.[4] An enrollment could be vacated for irregularity[5] or for surprise, mistake, fraud, or excusable neglect.[6] After the decree had been enrolled, it could only be altered by a bill of review or an appeal to the House of Lords.[7] The enrollment was made after the Lord Chancellor had signed the docket, by the engrossment of an exact copy upon the parchment rolls, which together with the docket were carried into the record room of the record and writ clerk's office and deposited with the record keeper for safe custody. Thereupon the enrollment was complete.[8] In the Federal courts there is no formal enrollment such as was made in chancery; but the statute requires that a final record be made up by the clerk, and that "in equity and admiralty cases, only the process, pleadings, decree, and such orders and memorandums as may be necessary to show the jurisdiction of the court and regularity of the proceedings shall be entered upon the final record."[9] This record has been said to correspond in some respects to the enrollment in chancery; but what effect it has upon the rights of the parties seems never to have been decided.[10]

[3] Gartside v. Isherwood, 2 Dick. 612; Sheffield v. Duchess of Buckingham, Amb. 586; s. c., West R. 673; Daniell's Ch. Pr. (1st Am. ed.) 1225.

[4] Barnes v. Wilson, 1 R. & M. 486.

[5] Daniell's Ch. Pr. (1st Am. ed.) 1230, 1232.

[6] Kemp v. Squire, 1 Ves. Sr. 205; Millspaugh v. McBride, 7 Paige (N. Y.), 509; Tripp v. Vincent, 8 Paige (N. Y.), 176; Daniell's Ch. Pr. (1st Am. ed.) 1230, 1232.

[7] Daniell's Ch. Pr. (1st Am. ed.) 1232; Gore v. Purdon, 1 Sch. & Lef. 234. See *infra*, § 27.

[8] Daniell's Ch. Pr. (1st Am. ed.) 1227, 1228.

[9] U. S. R. S., § 750.

[10] Consolidated Store S. Co. v. Dettenthaler, 93 Fed. R. 307. See *infra*, ch. XXVII.

CHAPTER XXV.

COSTS.

§ 326. Definition of costs and distinction between costs at law and in equity.— Costs is the term given to the sum of money which is paid to the successful party to a litigation, to reimburse him for his expense and trouble in the same. The costs of an action at law are governed by fixed and arbitrary rules.[1] In equity, the award or denial of costs is always in the discretion of the court;[2] and so very frequently is their amount when awarded.[3] When, however, it is said, as it often is, that the award of costs in equity is purely discretionary, it should not be supposed that courts of equity are governed by no fixed principles in their decisions relative to the costs of proceedings before them. All that is meant by the expression is that, in awarding costs, they will take into consideration the circumstances of the cases before them and the situation or conduct of the parties, and exercise with reference to these points a discretion governed by certain reasonably definite rules, the enforcement of which is not dependent upon the caprice of the judge by whom each cause happens to be heard, but is often a ground of review by an appellate tribunal.[4]

§ 327. Who are given costs.— Courts of common law invariably award costs to the successful party, except in the cases hereinafter stated.[1] Courts of chancery in general follow the rule of the civil law, *victus victori in expensis condemnatus est*, and decree the payment of costs by the unsuccessful to the successful parties to a suit before it.[2] It often happens, how-

§ 326. [1] Hathaway v. Roach, 2 W. & M. 63.

[2] Riddle v. Mandeville, 6 Cranch, 86.

[3] Trustees v. Greenough, 105 U. S. 527; Central R. Co. v. Pettus, 113 U. S. 116.

[4] Brooks v. Byam, 2 Story, 553; Trustees v. Greenough, 105 U. S. 527; Central R. Co. v. Pettus, 113 U. S. 116.

§ 327. [1] Hathaway v. Roach, 2 W. & M. 63.

[2] Wooster v. Handy, 23 Fed. R. 49; Am. D. R. Co. v. Sheldon, 28 Fed. R. 217; Vancouver v. Bliss, 11 Ves. 458; Staines v. Morris, 1 V. & B. 8; Millington v. Fox, 3 M. & C. 338, 358; Hunter v. Town of Marlboro', 2 W. & M. 168; Hovey v. Stevens, 3 W. & M. 17.

ever, that they depart so far from this rule as to deny costs to the successful party, and, in certain classes of cases, they will even compel him to pay costs to those against whom he obtains a decree.[3] In some cases the costs may be apportioned.[4] Where the line of a railroad company had been operated by a receiver of the corporation in possession of the same, it was held liable for a certain proportion of the costs of the receivership, although not a party to the suit in which the receiver was appointed, when it appeared simply for the purpose of contesting its liability for such costs.[5] Under no circumstances, however, will a court dismiss a plaintiff's bill and award him costs against a defendant,[6] although under special circumstances it might then allow him costs out of a fund in court.[7] If a plaintiff begins or continues a suit after he has received formal notice of a full and unconditional offer of all that he is entitled to, he may be denied costs, not only of all the proceedings taken by him after such an offer,[8] but also of the whole suit.[9] This principle applies to bills for an accounting; where, although on account of the uncertain state of the account the defendant may not be liable to make a tender of the balance due from him, and so omits it, yet if he has shown a willingness to ac-

[3] Grattan v. Appleton, 3 Story, 755; Brooks v. Byam, 2 Story, 553.

[4] Farwell v. Kerr, 28 Fed. R. 345; Lippincott v. Shaw C. Co., 34 Fed. R. 570; Am. B. M. Co. v. Crosman, 57 Fed. R. 1029; Heighington v. Grant, 1 Beav. 230; Seton on Decrees (4th ed.), vol. 1, p. 129; Tefft v. Stern (C. C. A.), 74 Fed. R. 755; Davis v. Parkman (C. C. A.), 71 Fed. R. 961; Ecaubert v. Appleton (C. C. A.), 67 Fed. R. 917; U. S. Sugar Refinery v. Providence S. & G. P. Co. (C. C. A.), 62 Fed. R. 875.

[5] Pennsylvania Co. for Insurance, etc. v. Jacksonville, T. & K. St. Ry. Co. (C. C. A.), 66 Fed. R. 421; Tesla El. Co. v. Scott, 101 Fed. R. 524.

[6] Barnes v. Omally, 4 McLean, 576; Hobbs v. McLean, 117 U. S. 567. But see Fechheimer v. Baum, 43 Fed. R. 719, 730, and *infra*, § 335. Where a bill to enjoin the infringement of a patent by a corporation and its officers was dismissed as against the officers, but sustained against the company, it was held that the individual defendants must pay their own costs and such as were incurred in bringing them into the suit, but not a docket fee. National F. B. & P. Co. v. Dayton P. N. Co., 97 Fed. R. 331, 333. See also Consolidated R. S. Co. v. Chicago, P. & St. L. Ry. Co., 69 Fed. R. 412.

[7] Fechheimer v. Baum, 43 Fed. R. 719, 734; *infra*, § 335. But see Hobbs v. McLean, 117 U. S. 567.

[8] Millington v. Fox, 3 M. & C. 338, 352; Loveridge v. Larned, 7 Fed. R. 294; Calkins v. Bertrand, 8 Fed. R. 755. But see Inhabitants of N. B. Tp. v. Halsey, 117 U. S. 336.

[9] Millington v. Fox, 3 M. & C. 338, 352; Lowell Mfg. Co. v. Whittal, 71 Fed. R. 515.

count, the court may relieve him from paying costs.[10] If a plaintiff charge fraud which he fails to prove, although he establishes his case on other grounds,[11] or, in some cases, if he claims relief more extensive than that to which he is entitled,[12] or if, on account of public policy or otherwise, he is allowed to obtain relief in a matter wherein he himself acted unlawfully or dishonorably,[13] or if he have been guilty of laches,[14] which do not bar his claim entirely,—he will be denied costs. A defendant will also be denied costs when successful under similar circumstances;[15] for instance, when the plaintiff's bill is clearly bad and he answers instead of demurring.[16]

Instances where costs have not been given to a successful party, because the situation of his adversary appealed to the sympathy of the court, were where the decision of the case involved the decision of a difficult and doubtful question of law,[17] especially in suits brought for the specific performance of a contract affecting the sale of land;[18] where the court enforced a contract made upon a very inadequate consideration;[19] and other cases of peculiar hardship.[20] A change of the law by a ruling of the Supreme Court subsequent to the filing of the bill has been held

[10] Parrot v. Treby, Prec. in Ch. 254; Bennett v. Attkins, 1 Y. & C. 247; Ashburnham v. Thompson, 13 Ves. 402. But see Daniell's Ch. Pr. (5th Am. ed.), 1396, 1397.

[11] Wright v. Howard, 1 Sim. & S. 190; Scott v. Dunbar, 1 Molloy, 442. See Fisher v. Boody, 1 Curt. 206, 223.

[12] Baldwin v. Ely, 9 How. 580.

[13] Debenham v. Ox, 1 Ves. Sen. 276; Davis v. Symonds, 1 Cox Eq. 402.

[14] Anon., 2 Atk. 14; Lee v. Brown, 4 Ves. 362.

[15] Atty. Gen. v. Brewers' Co., 1 P. Wms. 376; Bunker v. Stevens, 26 Fed. R. 245.

[16] Brooks v. Byam, 2 Story, 553; Harland v. Bankers' & M. Tel. Co., 32 Fed. R. 305. Where the defendant, after an unsuccessful defense upon the merits, raised for the first time a fatal jurisdictional objection by a motion to dismiss his own writ of error, the Circuit Court of Appeals imposed upon him the costs of the writ of error and left the question of the costs below to be decided by the Circuit Court. Hunt v. Howes (C. C. A.), 74 Fed. R. 657. Where a bill filed by trustees was dismissed upon appeal for failure to plead the jurisdictional facts to which no objection had been made, it was held that the costs should be taxed against the complainants as trustees only and not against them individually. Tug R. C. & S. Co. v. Brigel (C. C. A.), 70 Fed. R. 647.

[17] Grattan v. Appleton, 3 Story, 755; Rose v. Calland, 5 Ves. 186.

[18] Rose v. Calland, 5 Ves. 186; White v. Foljambe, 11 Ves. 337; Willcox v. Bellaers, T. & R. 491.

[19] Burrowes v. Lock, 10 Ves. 470.

[20] Lillia v. Airey, 1 Ves. Jr. 277; Shales v. Barrington, 1 P. Wms. 491; Drybutter v. Bartholomew, 2 P. Wms. 127.

to be no ground for refusing the defendant costs.[21] Costs are usually included in a decree for a perpetual injunction against the infringement of a trade-mark, although no demand that he cease using the trade-mark was made on the defendant before the suit was brought.[22]

The Revised Statutes provide that when in a Circuit Court a plaintiff in an action at law originally brought there, or a petitioner in equity other than the United States, recovers less than the sum or value of five hundred dollars, exclusive of costs, in a case which cannot be brought there unless the amount in dispute exclusive of costs exceeds said sum or value, he shall not be allowed costs, and the court may in its discretion award costs against him.[23] This statute applies where by the allowance of a counterclaim the amount recovered by the plaintiff is reduced to less than five hundred dollars.[24] The statute does not apply to a suit removed from a State court.[25] If the amount recovered is less than two thousand, but more than five hundred dollars, the statute does not apply, although the jurisdictional amount is now the former sum.[26] If there was, when the suit was brought, a reasonable expectation of the recovery of more than five hundred dollars, costs will not be awarded against the plaintiff.[27]

The English rule seems to be, that it is beneath the dignity of a sovereign to demand costs, and that, therefore, when he is successful in a suit, his counsel will waive all claim for any.[28] In the Federal Circuit and District Courts, however, costs are

[21] Fargo v. South Eastern Ry. Co., 28 Fed. R. 906.

[22] Sawyer v. Kellogg, 9 Fed. R. 601.

[23] U. S. R. S., § 968. For a peculiar case, see National Steamship Co. v. Tugman, 67 Fed. R. 16.

[24] Hamilton v. Baldwin, 41 Fed. R. 429.

[25] Field v. Schell, 4 Blatchf. 435; Ellis v. Jarvis, 3 Mason, 457: Kreager v. Judd, 5 Fed. R. 27. Where the State statute provided that in certain cases, if the plaintiff recovered less than a specified amount of damages, his costs should not exceed his damages, it was held that the statute should be applied by the Federal courts after a removal. Reichter v. Magone, 47 Fed. R. 192.

[26] Eastman v. Sherry, 37 Fed. R. 844; Johnson v. Watkins, 40 Fed. R. 187.

[27] Gibson v. Memphis, etc. R. Co., 31 Fed. R. 553. For the rule under the practice at common law in Tennessee, see Johnson v. Mississippi & T. R. Co., 31 Fed. R. 551.

[28] Emperor of Austria v. Day, 2 Giff. 628; s. c., 3 De G., F. & J. 217.

awarded to the United States, even when not specifically prayed for in the bill.[29]

In suits in the Court of Claims, Circuit or District Courts to adjust claims against the United States, costs cannot be allowed unless the government put in issue the right of the plaintiff to recover; and then only in the discretion of the court.[30] Costs in such a suit include only "what is actually incurred for witnesses and summoning the same, and fees paid to the clerk of the court."[31] No costs are allowed against the United States in a suit to recover a penalty or forfeiture accruing under any law providing for the internal revenue, when the suit was brought by the government on information received from any person other than a collector, deputy collector, or inspector of internal revenue,[32] nor upon the dismissal of condemnation proceedings instituted by them.[33] No costs are awarded for or against the United States in the Supreme Court, or in the Circuit Court of Appeals,[34] but a Circuit Court of Appeals has awarded costs of the Circuit Court against them upon an appeal from the decision of a board of appraisers.[35]

When upon a reference the master reports in favor of the plaintiff for nominal damages, the award of costs is in the discretion of the court, and depends upon the peculiar circumstances of each case.[36]

The successful party to a suit may also be obliged to pay costs to an opponent who has not acted unconscientiously, in three classes of cases: when the successful party has acted unconscientiously in the suit or in the matters which gave rise to it;[37] when a defendant has been necessarily made a party to a

[29] U. S. v. Southern Pac. R. Co., 56 Fed. R. 865.

[30] 24 St. at L. 508, § 15.

[31] 24 St. at L. 508, § 15.

[32] U. S. R. S., § 969.

[33] Carlisle v. Cooper, 64 Fed. R. 472.

[34] S. C. Rule 24; C. C. A. Rule 31.

[35] U. S. v. Davis (C. C. A.), 54 Fed. R. 147. *Contra*, Marine v. Lyon (C. C. A.), 62 Fed. R. 153.

[36] Calkins v. Bertrand, 8 Fed. R. 755; Everest v. Buffalo Lubricating Oil Co., 31 Fed. R. 742; Hill v. Smith, 32 Fed. R. 753; Kirk v. DuBois, 46 Fed. R. 486.

[37] Wright v. Howard, 1 Sim. & S. 190. For example, where the complainant obtains only a small part of the relief which he prayed and the greater part of the expense of the litigation was caused by his unsuccessful claims. Thomson-Houston El. Co. v. Elmira & H. R. Co., 71 Fed. R. 886. See also Ecaubert v. Appleton (C. C. A.), 67 Fed. R. 917. Where it was held that a party had improperly filed a cross-bill, but relief was given him upon the theory that his cross-bill should be considered as a petition of intervention, he was re-

suit in which he has no direct personal interest,— for example, an heir-at-law, who is a passive defendant to a suit to prove a will;[38] and when a bill is filed to redeem a pledge or relieve an estate from the burden of a mortgage or other incumbrance.[39] In cases where the finally successful party is obliged without his fault to pay costs to one of the others, if the suit was made necessary by the misconduct of one of the defendants, he is obliged to repay the amount of those costs to the winner.[40] Thus, the costs paid out of the fund to the plaintiff in a suit of interpleader are usually decreed to be repaid by the unsuccessful defendant.[41] In suits founded upon letters-patent for inventions, when the patentee has claimed in his specification that he was the original inventor of more than he did first invent, he cannot recover costs unless he has filed a proper disclaimer in the Patent Office before the commencement of the suit.[42] Where a suit at law, equity or admiralty is dismissed in the court of first instance for want of jurisdiction over the person of defendant or over the subject-matter, or for a lack of the requisite difference of citizenship, no costs are allowed, provided that the complainant's plea does not allege the jurisdictional facts;[43] but where in such a case he has averred facts which would give jurisdiction, costs will be awarded against him.[44] When a case removed from a State court is remanded for want of jurisdiction in the Circuit Court, the right to costs is secured by the bond filed with the petition for removal.[45] When cases were begun in State courts and afterwards removed, the costs accrued in the State court before the removal have

quired to pay the costs upon the cross-bill in the original court and the court of review. Gregory v. Pyke, 67 Fed. R. 837.

[38] Crew v. Joliff, Prec. in Ch. 93; Luxton v. Stephens, 3 P. Wms. 373.

[39] Taner v. Ivie, 2 Ves. Sen. 466, 468.

[40] Martinius v. Helmuth, 2 V. & B. 412, note. See Brodie v. St. Paul, 1 Ves. Jr. 326; Badeau v. Rogers, 2 Paige Ch. (N. Y.) 209.

[41] Martinius v. Helmuth, 2 V. & B. 412, note; Badeau v. Rogers, 2 Paige Ch. (N. Y.) 209. But see Ferguson v. Dent, 46 Fed. R. 88; *infra*, § 334.

[42] U. S. R. S., § 4922; Proctor v. Brill, 16 Fed. R. 791.

[43] Burnham v. Rangeley, 2 W. & M. 417; Pentlarge v. Kirby, 20 Fed. R. 898. But see U. S. v. Treadwell, 15 Fed. R. 532; Cooper v. N. H. S. Co., 18 Fed. R. 588.

[44] The City of Florence, 56 Fed. R. 236; Lowe v. The Benjamin, 1 Wall. Jr. 187; Thomas v. White, 12 Mass. 367; Sawyer v. Williams, 72 Fed. R. 296.

[45] See § 3 of Judiciary Act of 1875, as amended in 1887; 24 St. at L., ch. 373.

been allowed.[46] No costs are usually granted in a case in the Circuit Court where the judges are divided.[47] In an appellate court, when a judgment or decree is reversed for want of jurisdiction in the court below, costs are imposed upon the party who sought the jurisdiction of the court below, either by original process or by removal, whether he is respondent or appellant.[48] When an appeal or writ of error is dismissed for want of jurisdiction, costs of the motion, including the clerk's fee for printing and supervising the record, may be taxed.[49] When both parties appeal, and the decree is in all respects affirmed, usually no costs of the appeal are allowed.[50] In a case where the appellant succeeded only in modifying the decree, it was held that neither party should have the costs of the appeal.[51] A party who by stipulation took no part in an appeal is not entitled to any costs in the appellate court.[52] The fact that the decree is affirmed upon grounds not stated in the opinion of the court of first instance does not necessarily deprive the respondent of costs.[53]

§ 328. Classification of costs.—Different principles regulate the amount of costs according as they are decreed to be paid by one party to another, or out of a fund in court.[1] In the former case costs are said to be taxed as between party and party, in the latter as between solicitor and client.[2]

[46] Wolf v. Insurance Co. (D. Mich.), 1 Flip. 377; Cleaver v. Traders' Ins. Co. (D. Md.), 40 Fed. R. 863. See Central T. Co. v. Central Iowa Ry. Co., 38 Fed. R. 889. *Contra* in the Second Circuit. Chadbourne v. German Am. Ins. Co., 31 Fed. R. 625; Clare v. National City Bank, 14 Blatchf. 445.

[47] Veazie v. Williams, 3 Story, 611, 632.

[48] Mansfield, C. & L. M. Ry. Co. v. Swan, 111 U. S. 379; Continental Ins. Co. v. Rhoads, 119 U. S. 237; Peper v. Fordyce, 119 U. S. 469; Everhart v. Huntsville College, 120 U. S. 223; King Bridge Co. v. Otoe County, 120 U. S. 225; Peninsula Iron Co. v. Stone, 121 U. S. 631; Chapman v. Barney, 129 U. S. 677. Where the defect in jurisdiction was raised by the appellant for the first time upon the appeal, it has been held that he could not recover his costs in the latter court, but that the costs below should be divided, Tug River C. & S. Co. v. Brigel (C. C. A.), 67 Fed. R. 625; and in one such case the costs of the writ of error were imposed on the appellant. Hunt v. Howes (C. C. A.), 74 Fed. R. 657.

[49] Bradstreet Co. v. Higgins, 114 U. S. 262; Cir. Ct. of App. Rule 23.

[50] The William Cox, 9 Fed. R. 672.

[51] New England R. Co. v. Carnegie Steel Co. (C. C. A.), 75 Fed. R. 54.

[52] Pollard v. Reardon, 65 Fed. R. 848.

[53] Post v. Beacon V. P. & El. Co., 89 Fed. R. 1.

§ 328. [1] Trustees v. Greenough, 105 U. S. 527; Central R. Co. v. Pettus, 113 U. S. 116.

[2] Trustees v. Greenough, 105 U. S.

§ 329. Costs as between party and party.— Costs as between party and party are regulated by statute. They are the amount of the "bill of fees of the clerk, marshal, and attorney, and the amount paid printers and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trials."[1]

§ 330. Attorney's fees.— The Revised Statutes fix the following sums to be taxed as attorney's fees in a bill of costs between party and party: "On a trial before a jury, in civil or criminal causes, or before referees, or on a final hearing in equity or admiralty, a docket fee of twenty dollars, provided that in cases of admiralty and maritime jurisdiction, where the libelant recovers less than fifty dollars, the docket fee of his proctor shall be but ten dollars. In cases at law, when judgment is rendered without a jury, ten dollars. In cases at law, when the cause is discontinued, five dollars. For *scire facias* and other proceedings on recognizances, five dollars. For each deposition taken and admitted in evidence in a cause, two dollars and fifty cents. For services rendered in cases removed from a District to a Circuit Court by writ of error or appeal, five dollars."[1]

A docket fee is taxed for a hearing upon an appeal.[2] It has been held that a docket fee can be taxed for each hearing, including a rehearing, before the court after bill, answer, and replication have been filed,[3] but not for a hearing upon a demurrer which is overruled, when the defendant has leave to answer and an answer is filed.[4] When a demurrer is sustained,

527; Central R. Co. v. Pettus, 113 U. S. 116.

§ 329. [1] U. S. R. S., § 983. But see Spaulding v. Tucker, 2 Sawyer, 50.

§ 330. [1] U. S. R. S., § 824. The same and the three following sections also regulate the fees of district attorneys. Besides the cases elsewhere cited, see Bashaw v. U. S., 47 Fed. R. 40. A state statute allowing an extra allowance in a partition suit was followed by the Federal court. Willard v. Serfell, 62 Fed. R. 625. The question whether counsel fees stipulated for in a note or mortgage can be taxed, depends upon the local law of the State in both suits on the common-law side of the court; and suits in equity, so far as taxation against the defendant is concerned. Bendey v. Townsend, 109 U. S. 665; Dodge v. Tolleys, 144 U. S. 451; Gray v. Havermeyer, 53 Fed. R. 174. See also Fowler v. Equitable Tr. Co., 141 U. S. 384; Robinson v. Alabama & G. Mfg. Co., 51 Fed. R. 268; American F. L. M. Co. v. Whaley, 63 Fed. R. 743.

[2] Kansas City, Ft. S. & Mo. Ry. Co. v. McDonald, 60 Fed. R. 522; John Shillito Co. v. McClung, 66 Fed. R. 22.

[3] Am. D. R. B. Co. v. Sheldon, 28 Fed. R. 217; Peck S. & W. Co. v. Fray, 92 Fed. R. 947.

[4] McLean v. Clark, 23 Fed. R. 861.

a docket fee is allowed.[5] When a motion to remand is granted, a docket fee is allowed.[6] To constitute "a final hearing in equity or admiralty," there must be a hearing of the cause upon its merits.[7] No docket fee is allowed for a hearing upon an interlocutory application by a party to the suit.[8]

When a bill is dismissed without a hearing no docket fee is allowed.[9] When a bill is taken as confessed, there must be a hearing before the decree, and consequently the complainant is entitled to tax a docket fee.[10] It has been held that no docket fee will be allowed on the dismissal of a bill for want of prosecution;[11] nor for a reference upon a motion for an interlocutory injunction;[12] nor for a hearing upon a petition for leave to intervene;[13] nor when the complainant has the bill dismissed upon his own motion before a final hearing;[14] nor for a trial at which the jury disagreed.[15] It has been said that "the fee is taxable whenever the trial is entered upon by the swearing of a jury in a common-law case, or by the introduction of testimony or the final opening of the argument upon a final hearing in equity or admiralty. The fee is not made by the statute to depend upon a judgment or decree, but is taxable on a trial

[5] Price v. Coleman, 23 Fed. R. 694.

[6] Josslyn v. Phillips, 29 Fed. R. 481.

[7] Wooster v. Handy, 23 Fed. R. 49; Goodyear D. V. Co. v. Osgood, 2 B. & A. Pat. Cas. 529; Coy v. Perkins, 13 Fed. R. 111; Yale Lock Mfg. Co. v. Colvin, 14 Fed. R. 269. *Contra*, Goodyear v. Sawyer, 17 Fed. R. 2.

[8] Doughty v. West B. & C. Mfg. Co., 8 Blatchf. 107; Central Tr. Co. v. Wabash, St. L. & P. R. Co., 32 Fed. R. 684.

[9] Wooster v. Handy, 23 Fed. R. 49; Goodyear D. V. Co. v. Osgood, 2 B. & A. Pat. Cas. 529; Coy v. Perkins, 13 Fed. R. 111; Yale L. Mfg. Co. v. Colvin, 14 Fed. R. 269. *Contra*, Goodyear v. Sawyer, 17 Fed. R. 2.

[10] Andrews v. Cole, 20 Fed. R. 410.

[11] Wooster v. Handy, 23 Fed. R. 49; Wighton v. Brainerd, 28 Fed. R. 29.

[12] Doughty v. W. B. & C. Mfg. Co., 8 Blatchf. 107.

[13] Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 32 Fed. R. 684; Mo. Pac. Ry. Co. v. Texas & P. Ry. Co., 38 Fed. R. 775. But see U. S. v. Payne, 147 U. S. 687. *Cf.* U. S. v. King, 147 U. S. 676.

[14] Coy v. Perkins, 13 Fed. R. 111; Yale Lock Mfg. Co. v. Colvin, 14 Fed. R. 269; Wooster v. Handy, 23 Fed. R. 49; Cahn v. Qung Wah Lung, 28 Fed. R. 396; Ryan v. Gould, 32 Fed. R. 754; N. Y. B. & B. Co. v. N. J. C. S. & R. Co., 32 Fed. R. 755. *Contra*, Goodyear v. Sawyer, 17 Fed. R. 2.

[15] Cleaver v. Traders' Ins. Co., 40 Fed. R. 863; Dedekam v. Vose, 3 Blatchf. 77, 153; Troy I. & N. Factory v. Corning, 7 Blatchf. 16; Strafer v. Carr, 6 Fed. R. 466; Huntress v. Town of Epsom, 15 Fed. R. 732. But see Schmieder v. Barney, 19 Blatchf. 143; s. c., 7 Fed. R. 451; Wooster v. Handy, 23 Fed. R. 49. It has been held that in such a case a district attorney may collect the docket fee from the United States. Van Hoorebeke v. U. S., 46 Fed. R. 456.

or final hearing. As the labor for which the docket fee is supposed to be a compensation is performed on or before the trial, equitably the party ought not to lose the benefit of it by a discontinuance entered after the trial or hearing has begun."[16] In a case where, after an interlocutory decree requiring the defendant to account, the plaintiff moved for a dismissal of his bill, he was obliged to pay the defendant a docket fee as well as other costs.[17] Where several suits by the same plaintiffs against different defendants were submitted and tried together before referees, a docket fee in each case was allowed.[18] It has been said that no docket fee should be allowed when the attorney who appeared and acted for the successful party throughout the case was not admitted to practice in the court where the case was pending, nor admitted to practice in the Supreme Court of the United States before the filing of the general replication.[19] No docket fee is allowed to a party, not an attorney, who conducts his own case.[20]

The fee for taking a deposition is only allowed for a deposition taken *de bene esse* for use on the final hearing;[21] not for oral testimony in court;[22] nor, perhaps, for a deposition taken before a master or examiner;[23] nor for a deposition taken for use upon an interlocutory application, such, it was held, as an application for leave to intervene or a hearing upon the intervenor's claim,[24] or an application for an interlocutory injunction,[25] or an application to punish a person for a contempt,[26] unless it is subsequently put in evidence at the hearing of the

[16] The Bay City, 8 Fed. R. 47, per Mr. Justice Brown.

[17] Goodyear v. Sawyer, 17 Fed. R. 2.

[18] Switzer v. Home Ins. Co., 46 Fed. R. 50.

[19] Goodyear D. V. Co. v. Osgood, 13 Off. Gaz. 325.

[20] Gorse v. Parker, 86 Fed. R. 840.

[21] Wooster v. Handy, 23 Fed. R. 49, 57; In re Strauss v. Meyer, 22 Fed. R. 467; Tuck v. Olds, 29 Fed. R. 883; Troy I. & N. Factory v. Corning, 7 Blatchf. 16.

[22] Troy I. & N. Factory v. Corning, 7 Blatchf. 16.

[23] In re Strauss v. Meyer, 22 Fed. R. 467; Tuck v. Olds, 29 Fed. R. 883; Mo. Pac. Ry. Co. v. Texas & P. Ry. Co., 38 Fed. R. 775. In the Second and Sixth Circuits such deposition fees are taxable. Ingham v. Pierce, 37 Fed. R. 647; Hake v. Brown, 44 Fed. R. 734; Ferguson v. Dent, 46 Fed. R. 88.

[24] Central T. Co. v. Wabash, St. L. & P. Ry. Co., 32 Fed. R. 684; Mo. Pac. Ry. Co. v. Texas & P. Ry. Co., 38 Fed. R. 775.

[25] Simpson v. Brooks, 3 Blatchf. 456.

[26] Spill v. Celluloid M. Co., 28 Fed. R. 870.

cause upon issue joined.[27] The authorities conflict as to whether a party can tax the costs of a deposition taken in good faith which was not offered in evidence upon the trial or hearing.[28] When the testimony of several witnesses is taken by the same officer and returned to court under the same enclosure, the testimony of each witness is considered as a separate deposition.[29] As to the taxation of the fee for taking a deposition which is admitted in evidence in several suits, the decisions are not harmonious. It seems settled that when, by stipulation, a deposition is taken once for use in several suits, in each of which it is entitled, and in each of which the witness is sworn, a deposition fee may be taxed in each suit.[30] Where, however, a deposition taken in one suit is by stipulation read in another, the rule, except in the district of Tennessee[31] and perhaps in that of New Jersey,[32] would seem to be that the fee can only be taxed in the first suit.[33] The expenses of taking the deposition cannot be deducted from the attorney's fee.[34] It has been held that the fee cannot be taxed in favor of a party who did not appear by an attorney at the taking of the deposition.[35] The attorney's costs belong to the party, not to his attorney, and proceedings to collect them should be taken in the name of the party.[36] In the absence of a special agreement, however, the value of the attorney's services to his client will be considered as worth at least the taxable costs.[37]

[27] Indianapolis W. Co. v. American S. B. Co., 65 Fed. R. 534.

[28] It was held that he can, in Sloss I. & S. Co. v. South Carolina & G. R. Co., 75 Fed. R. 106; Hunter v. International Ry. Imp. Co., 28 Fed. R. 842; Nead v. Millersburg H. W. Co., 79 Fed. R. 129. *Contra*, Pinson v. Atchison, T. & S. F. R. Co., 54 Fed. R. 464.

[29] Broyles v. Buck, 37 Fed. R. 137.

[30] Wooster v. Handy, 23 Fed. R. 49, 63; Archer v. Hartford F. Ins. Co., 31 Fed. R. 660; Green v. French, 5 N. J. L. J. 228.

[31] Jerman v. Stewart, 12 Fed. R. 271; Archer v. Hartford F. Ins. Co., 31 Fed. R. 660.

[32] Green v. French, 5 N. J. L. J. 228.

[33] Wooster v. Handy, 23 Fed. R. 49, 58; Am. Diamond R. B. Co. v. Sheldon, 28 Fed. R. 217; Winegar v. Cahn, 29 Fed. R. 676; Carey v. Lovell Mfg. Co., 39 Fed. R. 163.

[34] Broyles v. Buck, 37 Fed. R. 137.

[35] Winegar v. Cahn, 29 Fed. R. 676.

[36] Broyles v. Buck, 37 Fed. R. 137.

[37] Celluloid Mfg. Co. v. Chandler, 27 Fed. R. 9. The fees that district attorneys can tax against the United States are not discussed in this edition.

By the act of May 28, 1896 (29 St. at L. 180, 181, 186), the compensation of all the district attorneys of the United States, except those for the Southern District of New York and the District of Columbia, is limited to salaries therein fixed. The district attorney for the Southern District of New York still receives com-

§ 331. Clerk's fees.— The fees of the clerk of the Supreme Court are fixed by rule as follows: "For docketing a case and filing and indorsing the transcript of the record, five dollars. For entering an appearance, twenty-five cents. For entering a continuance, twenty-five cents. For filing a motion, order, or other paper, twenty-five cents. For entering any rule, or for making or copying any record or other paper, twenty cents per folio of each one hundred words. For transferring each case to a subsequent docket and indexing the same, one dollar. For entering a judgment or decree, one dollar. For every search of the records of the court, one dollar. For a certificate and seal, two dollars. For receiving, keeping, and paying money in pursuance of any statute or order of court, two per cent. on the amount so received, kept, and paid. For an admission to the bar and certificate under seal, ten dollars. For preparing the record or a transcript thereof for the printer, indexing the same, supervising the printing, and distributing the printed copies to the justices, the reporter, the law library, and the parties or their counsel, fifteen cents per folio. For making a manuscript copy of the record, when required under Rule 10, twenty cents per folio, but nothing in addition for supervising the printing. For issuing a writ of error and accompanying papers, five dollars. For a mandate or other process, five dollars. For filing briefs, five dollars for each party appearing. For every copy of any opinion of the court, or any justice thereof, certified under seal, one dollar for every printed page, but not to exceed five dollars in the whole for any copy."[1] Upon moneys paid into court the clerk is allowed a commission of one per centum.[2] The compensation of the clerk of the Supreme Court is limited to six

pensation in addition to his salary in prize cases (U. S. R. S., §§ 4646, 4647; The Anna, Blatchf. Prize Cases, 337), and also when he appears by direction of the Secretary or Solicitor of the Treasury on behalf of any officer of the revenue in any suit against such officer for any act done by him, or for the recovery of any money received by him and paid into the Treasury in the performance of his official duties (U. S. R. S., § 827); and also for services under the direction of the Secretary of the Treasury and the Commissioner of Internal Revenue in suits or proceedings to recover fines, penalties and forfeitures (U. S. R. S., § 838; Re District Attorney, 23 Fed. R. 26; U. S. v. Bashaw, 152 U. S. 436), and in other cases.

§ 331. [1] Supreme Court Rule 24; 23 St. at L., ch. 443, p. 631.

[2] Florida v. Anderson, 91 U. S. 667.

thousand dollars a year. The balance of his fees and disbursements over and above his necessary clerk hire and incidental expenses, as certified by the Supreme Court or a justice thereof appointed by it for the purpose, must be paid into the Treasury.[3]

"1. In all cases the plaintiff in error or appellant, on docketing a case and filing the record, shall enter into an undertaking to the clerk, with surety to his satisfaction, for the payment of his fees, or otherwise satisfy him in that behalf.

"2. The clerk shall cause an estimate to be made of the cost of printing the record, and of his fee for preparing it for the printer and supervising the printing, and shall notify to the party docketing the case the amount of the estimate. If he shall not pay it within a reasonable time, the clerk shall notify the adverse party, and he may pay it. If neither party shall pay it, and for want of such payment the record shall not have been printed when a case is reached in the regular call of the docket, after March 1, 1884, the case shall be dismissed.

"3. Upon payment by either party of the amount estimated by the clerk, twenty-five copies of the record shall be printed, under his supervision, for the use of the court and of counsel.

"4. In cases of appellate jurisdiction the original transcript on file shall be taken by the clerk to the printer. But the clerk shall cause copies to be made for the printer of such original papers, sent up under Rule 8, section 4, as are necessary to be printed and of the whole record in cases of original jurisdiction.

"5. The clerk shall supervise the printing, and see that the printed copy is properly indexed. He shall distribute the printed copies to the justices and to the reporter, from time to time, as required, and a copy to the counsel for the respective parties.

"6. If the actual cost of printing the record, together with the fee of the clerk, shall be less than the amount estimated and paid, the amount of the difference shall be refunded by the clerk to the party paying it. If the actual cost and clerk's fee shall exceed the estimate, the amount of the excess shall be paid to the clerk before the delivery of a printed copy to either party or his counsel.

[3] 22 St. at L. 603. See U. S. R. S., § 844.

"7. In case of reversal, affirmance or dismissal, with costs, the amount of the cost of printing the record, and of the clerk's fee, shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process.

"8. Upon the clerk's producing satisfactory evidence, by affidavit or the acknowledgment of the parties or their sureties, of having served a copy of the bill of fees due by them, respectively, in this court, on such parties or their sureties, an attachment shall issue against such parties or sureties, respectively, to compel payment of the said fees."[4]

In cases of dismissal for want of jurisdiction, such fees are taxed against the party bringing the cause into court, unless the court otherwise directs.[5] When a party has printed the transcript of the record at his own expense, he may docket the case without giving security for the clerk's fees; but before the printed copies are delivered to the justices or the parties for use on the final hearing, or on any motion in the progress of the cause, the clerk can require the payment of fifteen cents a folio for attending to the correctness and proper indexing of the printed copies of the record.[7] If the clerk demand the fees in advance, they must be paid.[8] When the clerk has no security for fees due to him from a party entitled to a mandate, he may withhold the mandate until his fees are paid, or he is otherwise satisfied in that behalf.[9]

The salaries of the clerks of the Circuit Courts of Appeals are three thousand dollars a year, payable in equal quarterly instalments.[10] They must account for and pay to the United States the fees collected by them.[11] It has been held that they may retain for such fees five hundred dollars a year in addition to their salary.[12] Their fees have been fixed by the Supreme Court under statutory authority,[13] as follows: "Docketing a case and filing the record, five dollars. Entering an appearance, twenty-five cents. Transferring a case to the

[4] Rule 10.

[5] Re Amendments to Rules, 108 U. S. 1, 4.

[6] Supreme Court Rule 10.

[7] Bean v. Patterson, 110 U. S. 401.

[8] Steever v. Rickman, 109 U. S. 74.

[9] Osborn v. U. S., 131 U. S. cxxxvii.

[10] 26 St. at L. 826.

[11] Ibid.

[12] Morton v. U. S., 59 Fed. R. 349; U. S. v. Morton (C. C. A.), 65 Fed. R. 204.

[13] 29 St. at L. 536.

printed calendar, one dollar. Entering a continuance, twenty-five cents. Filing a motion, order or other paper, twenty-five cents. Entering any rule or making or copying any record or other paper, for each one hundred words, twenty cents. Entering a judgment or decree, one dollar. Every search of the records of the court and certifying the same, one dollar. Affixing a certificate and a seal to any paper, one dollar. Receiving, keeping and paying money, in pursuance to any statute or order of court, one per cent. on the amount so received, kept and paid. Preparing the record for the printer, indexing same, supervising and printing and distributing the copies, for each printed page of the record and index, twenty-five cents. Making a manuscript copy of the record, when required by the rules, for each one hundred words, but nothing in addition for supervising the printing, twenty cents. Issuing a writ of error and accompanying papers or a mandate or other process, five dollars. Filing briefs for each party appearing, five dollars. Copy of an opinion of the court, certified under seal, for each printed page, but not to exceed five dollars in the whole for any copy, one dollar."[14]

Where a transcript of a record of a Circuit Court has been duly certified by the clerk of that court to a Circuit Court of Appeals, there prepared for the printer, the printing supervised and the printed copies indexed and distributed by the clerk of the Circuit Court of Appeals; one of those printed copies with a certificate by such clerk stating that it is a transcript of the record there filed, together with a certified copy of the further proceedings there, is a sufficient transcript for the Supreme Court, and there is no need of paying the fees of the clerk of the Circuit Court of Appeals for a manuscript copy of the record there.[15]

In the Fourth, Sixth, Seventh and Eighth Circuits, where the record has been printed in the District or Circuit Court, a circuit judge may order that it be used in the Circuit Court of Appeals. In that case in the Sixth and Seventh Circuits the clerk of the latter court is allowed a fee for supervising the printing, and in the Seventh Circuit he must index it and charge a fee for that service.[16]

[14] 168 U. S. 720.

[15] Toledo, St. L. & K. C. Ry. Co. v. Continental Tr. Co., 176 U. S. 219.

[16] U. S. C. C. A. Rule 23 of three circuits. Rule 26 of the Fourth Circuit also allows this.

In the First, Third and Fifth Circuits the clerk of the Circuit Court of Appeals must receive from either party and use as parts of the printed record, so far as the same is of proper size and type, any parts of the same which were printed below, and also any printed copies of patents and exhibits, allowing the party furnishing the same such sum as the clerk deems reasonable, which sum thus paid is added to and forms part of the cost of printing.[17] A similar practice prevails in the Second Circuit.

The fees of the clerks of Circuit and District Courts are fixed by statute as follows:

"For issuing and entering every process, commission, summons, capias, execution, warrant, attachment or other writ, except a writ of venire, or a summons or subpœna for a witness, one dollar.[18] For issuing a writ of summons or subpœna, twenty-five cents.[19] For filing and entering every declaration, plea, or other paper, ten cents.[20] For administering an oath or affirmation, except to a juror, ten cents.[21] For taking an

[17] U. S. C. C. A. Rule 23 of these circuits.

[18] U. S. R. S., § 828. See Goodrich v. U. S., 47 Fed. R. 267; Jones v. U. S., 39 Fed. R. 410.

[19] U. S. R. S., § 828. See Erwin v. U. S., 37 Fed. R. 470; U. S. v. Van Duzee, 140 U. S. 169, 176; Jones v. U. S., 39 Fed. R. 410.

[20] U. S. R. S., § 828. So far as the clerk's fees are concerned, no paper is considered filed unless it has the proper indorsement by the clerk; and the merely placing a paper in the court papers is no filing. Erwin v. U. S., 37 Fed. R. 470, 484; Henry Amy & Co. v. Shelby County, 1 Flip. 104. But the failure of the clerk to mark as filed a paper left in his office for that purpose cannot prejudice the party who has given it to him. Phinney v. Mutual Life Ins. Co., 178 U. S. 327, 336. When it is necessary to enter on the calendar a note of such filing, an additional fee of fifteen cents is allowed. Erwin v. U. S., 37 Fed. R. 470, 484. The clerk is not entitled to a fee for filing vouchers attached to an account. U. S. v. Jones, 147 U. S. 672; U. S. v. Payne, 147 U. S. 687. See U. S. v. Van Duzee, 140 U. S. 169; U. S. v. McCandless, 147 U. S. 692; U. S. v. Taylor, 147 U. S. 695; Goodrich v. U. S., 47 Fed. R. 267; Dimmick v. U. S., 36 Fed. R. 82. If two or more depositions are embraced in a single paper, or a series of sheets attached together, they form but a single paper, within the meaning of the law. U. S. v. Barber, 140 U. S. 164, 168, per Mr. Justice Brown. It has been held that where the statutes are silent as to what papers shall be filed, that rests in the discretion of the judge of the court of first instance, and his decision will not be reviewed upon appeal. Pennsylvania Co. for Insurance, etc. v. Jacksonville, T. & K. W. Ry. Co., 66 Fed. R. 421.

[21] U. S. R. S., § 828. See U. S. v. Taylor, 147 U. S. 695; U. S. v. Van Duzee, 140 U. S. 169; Fuller v. U. S., 58 Fed. R. 820.

acknowledgment, twenty-five cents.[22] For taking and certifying depositions to file, twenty cents for each folio of one hundred words.[23] For a copy of such deposition furnished to a party on request, ten cents a folio."[24] A party may tax the fee paid for a copy of his own deposition, for use in printing the evidence, as required by a rule.[25] "For entering any return, rule, order, continuance, judgment, decree, or recognizance, or drawing any bond, or making any record, certificate, return, or report, for each folio, fifteen cents."[26]

The clerk may charge fees in an equity cause, as to absent defendants, as to whom the cause is continued.[27] Where a cause, after being referred to an auditor, is, with the sanction of the court, settled by the parties, and entry made, "Dis-

[22] U. S. R. S., § 828; U. S. v. Barber, 140 U. S. 177.

[23] U. S. R. S., § 828. Where a suit is voluntarily dismissed by the complainant, without a submission or hearing, on a settlement of the case at complainant's costs, with consent of the defendant and the attorneys of both parties, the solicitor's fees for taking depositions are not allowable; but the clerk's fees are a proper charge under a decree dismissing the case at complainant's costs. Cahn v. Qung Wah Lung, 28 Fed. R. 396.

[24] U. S. R. S., § 828.

[25] Brewster v. Shuler, 38 Fed. R. 549.

[26] U. S. R. S., § 828. See Erwin v. U. S., 37 Fed. R. 470. Where the number of words is less than one hundred, they are counted a folio; and as such entry is, in fact, a record, it was held that the departmental construction is the proper one, which gives the clerk ten cents for filing a paper, and fifteen cents for the record entry in the calendar. Amy v. Shelby County, 1 Flip. 104. But see U. S. v. Kurtz, 164 U. S. 49. A judgment is an order of the court within the meaning of the fee bill. Blake v. Hawkins, 19 Fed. R. 204. See Davis v. U. S., 45 Fed. R. 162; Goodrich v. U. S., 42 Fed. R. 392; U. S. v. Taylor, 147 U. S. 696; U. S. v. Payne, 147 U. S. 687; U. S. v. Van Duzee, 140 U. S. 169; Marvin v. U. S., 44 Fed. R. 405; Erwin v. U. S., 37 Fed. R. 470; Jones v. U. S., 39 Fed. R. 410; U. S. v. Converse, 63 Fed. R. 423; Fuller v. U. S., 58 Fed. R. 329. The clerk of the United States Circuit Court for the District of New Jersey is entitled to collect from the plaintiff, in an action at law, fees for recording the proceedings and judgments therein in favor of plaintiff. U. S. R. S., § 914, provides that the pleadings and forms and modes of proceedings in civil causes, other than equity and admiralty, in the Circuit and District Courts of the United States, shall conform as nearly as may be to the forms and modes of procedure in like causes in the States where such courts are held. Section 76 of the New Jersey General Statutes provides that when any civil action shall have been determined, the clerk of the court shall enter all the proceedings, including the judgment, in a book of records to be kept for that purpose. Morrison v. Bernard's Tp., 35 Fed. R. 400.

[27] Ex parte Lee, 4 Cranch, C. C. 197.

missed, at defendant's costs, by consent," the process and pleadings in the State court, together with the proceedings for removal sent up in the transcript, and the proceedings in the Federal court, should be entered upon the final record; and the clerk may properly charge fifteen cents per folio for each entry.[28] "For a copy of any entry or record, or of any paper on file, for each folio, ten cents.[29] For making dockets and indexes, issuing venire, taxing costs, and all other services, on the trial or argument of a cause where issue is joined and testimony is given, three dollars.[30] For making dockets and indexes, taxing costs, and all other services, in a cause where issue is joined, but no testimony is given, two dollars."[31] It has been held in the Ninth Circuit that the petitioner in an application for the writ of *habeas corpus* may be obliged to pay eleven dollars for all services in the proceeding; but that the court has discretion to allow no costs or fees in such a case.[32] "For making dockets and indexes, taxing costs, and other services, in a cause which is dismissed or discontinued, or where judgment or decree is made or rendered without issue, one dollar.[33] For making dockets and taxing costs, in cases removed by writ of error, or appeal, one dollar.[34] For affixing the seal of the court to any instrument, when required, twenty cents.[35] For every search for any particular mortgage, judgment, or other lien, fifteen cents.[36] For searching the

[28] Blain v. Home Ins. Co., 30 Fed. R. 667.

[29] U. S. R. S., § 828. The clerk is entitled to ten and not to fifteen cents per folio for transcripts of a record. A transcript is a copy. Cavender v. Cavender, 3 McCrary, 383. See Erwin v. U. S., 37 Fed. R. 470, 490; Jones v. U. S., 39 Fed. R. 410; U. S. v. Van Duzee, 140 U. S. 169; U. S. v. McCandless, 147 U. S. 692; U. S. v. Taylor, 147 U. S. 695.

[30] U. S. R. S., § 828. See U. S. v. Payne, 147 U. S. 687; U. S. v. King, 147 U. S. 676; U. S. v. Van Duzee, 140 U. S. 469; U. S. v. McCandless, 147 U. S. 692; Erwin v. U. S., 37 Fed. R. 470.

[31] U. S. R. S., § 828.

[32] In re Moy Chee Kee, 33 Fed. R. 877.

[33] U. S. R. S., § 828; U. S. v. Kurtz, 164 U. S. 49; U. S. v. Van Duzee, 140 U. S. 169; Van Duzee v. U. S., 41 Fed. R. 571.

[34] U. S. R. S., § 828. The clerk's fee of one dollar for filing the note of issue when placing an appeal in admiralty on the calendar is taxable, and the clerk may charge for including the evidence in the record on the final decree in admiralty. The Alice Tainter, 14 Blatchf. 225, 227.

[35] U. S. R. S., § 828. See Taylor v. U. S., 45 Fed. R. 531; U. S. v. Van Duzee, 140 U. S. 169; Marvin v. U. S., 44 Fed. R. 405; Fuller v. U. S., 58 Fed. R. 329.

[36] U. S. R. S. § 828.

records of the court for judgments, decrees, or other instruments constituting a general lien on real estate, and certifying the result of such search, fifteen cents for each person against whom such search is required to be made."[37] As the statutes do not expressly provide for compensation to the clerk for searching for petitions in bankruptcy, it has been held that a reasonable compensation for such service is fifteen cents for each name against which search is made.[38] The clerk of the Circuit Court, instead of certifying the result of a search for liens on the original requisition delivered to him, may, and perhaps should, file such requisition, and give the certificate of the result of the search on another paper. A charge of ten cents for filing such paper is proper,[39] and so also is a charge of fifteen cents for each person against whom a search is required to be made, as compensation for making the search, and for the act of signing the certificate and certifying the result.[40] A compensation of fifteen cents per folio for making the certificate is proper; but not a charge for affixing the seal of the court to such certificate, unless required.[41] "For receiving, keeping, and paying out money, in pursuance of any statute or order of court, one per centum on the amount so received, kept, and paid.[42] For traveling from the office of clerk where he is required to reside to the place of holding any court required by law to be held, five cents a mile for going, and five cents a mile for returning, and five dollars a day for his attendance on the court while actually in session."[43]

[37] U. S. R. S., § 828; In re Woodbury, 7 Fed. R. 705; Marvin v. U. S., 44 Fed. R. 405. It has been held that the clerk is liable for the damages which are the proximate result of a negligent search by him. Selover v. Sheardown, 73 Minn. 393; s. c., 76 N. W. R. 50.

[38] Matter of Vermeule, 10 Ben. 1.

[39] Ex parte Woodbury, 7 Fed. R. 705.

[40] Ibid.

[41] Ex parte Woodbury, 7 Fed. R. 705; U. S. v. Van Duzee, 140 U. S. 169.

[42] U. S. R. S., § 828. In California two per centum. U. S. R. S., § 840; U. S. v. Walters, 51 Fed. R. 896. It has been held that these commissions, when due out of a fund in the hands of a public officer, must be paid in the first instance into the treasury. U. S. v. Wolters, 51 Fed. R. 896. *Contra*, U. S. v. Cigars, 2

[43] U. S. R. S., § 828. But see 24 St. at L. 253, 541; Erwin v. U. S., 37 Fed. R. 470; Morrow v. U. S., 44 Fed. R. 405; U. S. v. Pitman, 147 U. S. 669; Goodrich v. U. S., 35 Fed. R. 198; Pleasants v. U. S., 35 Fed. R. 770; Jones v. U. S., 21 Ct. Cl. 1; U. S. v. King, 147 U. S. 676. See also U. S. R. S., §§ 839–846; 18 St. at L. 333; U. S. v. Hill, 120 U. S. 169.

In bankruptcy proceedings clerks shall respectively receive as full compensation for their service to each estate a filing fee of ten dollars, except when a fee is not required from a voluntary bankrupt.[44] "There is no law nor rule of court which causes an officer to lose his fees by not requiring payment in advance."[45] Consequently it has been held that the taxable costs earned by clerks, marshals and commissioners are their individual property, not that of the parties to the cause; and that the parties cannot by an agreement as to set-off, or otherwise, deprive the clerk or other creditors of any lien or right to collect their paid fees.[46]

All books in the offices of the clerks of the Circuit and District Courts containing the docket or minute of the judgments, or decrees thereof, must during office hours be open to the in-

Fed. R. 494. This charge has been held to include money collected by the marshal on executions. Fagan v. Cullen, 28 Fed. R. 843. Where an assignee in bankruptcy files a bill in the Circuit Court to settle conflicting claims to the proceeds of a sale, it is not his duty to pay the proceeds into the registry of the court; and consequently the clerk is not entitled to commissions on such money. Leach v. Kay, 2 Flip. C. C. 590. It has been held that the fact that the money is subject to the decree of the court, it not being in the court's registry, is not enough to give the clerk a right to commissions. Ex parte Plitt, 2 Wall. Jr. 453. But a subsequent decision holds that money deposited in a bank, under a decree of the court, and subject to its order, is within the meaning of chapter 20 of the acts of 1793, which provides that the clerk shall be entitled to a percentage on "all money deposited in court." Ex parte Prescott, 2 Gall. 146. The money must either actually or constructively pass through the clerk's hands. Leech v. Kay, 4 Fed. R. 72. Money received by a master in chancery in payment of property sold upon the foreclosure of a mortgage, may, in pursuance of section 995 of the Revised Statutes, be deposited with a designated depositary of the United States, and the clerk is then entitled to his commissions thereon. Thomas v. Chicago & C. S. Ry. Co., 37 Fed. R. 548. But money paid by a bidder at such a sale as security for his compliance with his bid may by order of the court be paid in a certified check on a bank, and deposited in a trust company, and then the clerk is not entitled to a commission thereon. Easton v. H. & T. C. Ry. Co., 44 Fed. R. 718. So a clerk who receives, keeps, and pays out money under a judgment is entitled to a commission of one per cent. on the amount so received, the same to be paid by the defendant as a part of the costs. Blake v. Hawkins, 19 Fed. R. 204. The court may allow the clerk extra compensation to the amount of one-half of one per cent. for transferring a large fund from the depository of the mint to a trust company. The Advance, 60 Fed. R. 422.

[44] 30 St. at L. 544, 559, § 52; *infra*, § 492.

[45] Aiken v. Smith (C. C. A.), 57 Fed. R. 423, 425, per Pardee, J.

[46] Ibid.

spection of any person desiring to examine the same, without any fees or charges therefor.[47]

§ 332. **Marshal's fees.**— "The marshal of the Supreme Court of the United States shall be entitled to receive for the service of any warrant, attachment, summons, capias, or other writ, except execution, venire, or a summons, or subpœna for a witness, one dollar for each person on whom such service may be made. His fees for all other services shall be the same as are herein allowed to other marshals; but he shall pay into the Treasury of the United States all fees received by him, and render a true account thereof at the close of each term to the Attorney-General."[1] The fees of the other United States marshals, which are paid by private litigants, are fixed by statute as follows:

"For service of any warrant, attachment, summons, capias, or other writ, except execution, venire, or a summons or subpœna for a witness, two dollars for each person on whom service is made."[2] The marshal has a right to demand in advance the payment of fees for the service of process,[3] and may have an attachment to enforce payment against suitors in the court,[4] or against an indorser on the writ who, by local law, is liable to respond for the costs.[5] "For the keeping of personal property attached on mesne process, such compensation as the court, on petition setting forth the facts under oath, may allow.[6] For holding a court of inquiry or other proceedings

[47] U. S. R. S., § 828; Re McLean, 9 Cent. L. J. 425; s. c., 2 Flip. 512; s. c., Fed. Cas. 8,877.

§ 332. [1] U. S. R. S., § 832.

[2] U. S. R. S., § 829.

[3] Ray v. Knowlton, 11 Biss. C. C. 360; Duy v. Knowlton, 14 Fed. R. 107.

[4] Anonymous, 2 Gall. 101.

[5] Ibid.

[6] U. S. R. S., § 829. The marshal's fees for the custody of goods in cases of seizure, and other proceedings *in rem*, are not discretionary, but are dependent upon the precise regulations of law, or, in the absence of such regulations, are to be allowed upon the principle of a *quantum meruit*, graduated by the ordinary value of similar services, and dependent upon the circumstances of each particular case. Where such fees are not regulated by law, an auditor should pass upon them. Bottomley v. U. S., 1 Story (Mass.), 135, 153. The marshal is entitled to be paid his fees at the time he delivers up the property to the person entitled to receive it. The Georgeanna, 31 Fed. R. 405. The court will not allow pay for extra men employed by the marshal to prevent the collector of customs from taking by force property from his custody. The Perseverance, 23 Fed. R. 462.

before a jury, including the summoning of a jury, five dollars.[7] For serving a writ of subpœna on a witness, fifty cents; and no further compensation shall be allowed for any copy, summons, or notice for a witness.[8] For serving a writ of possession, partition, execution, or any final process, the same mileage as is allowed for the service of any other writ; and for making the service, seizing or levying on property, advertising and disposing of the same by sale, set-off, or otherwise according to law, receiving and paying over the money, the same fees and poundage as are or shall be allowed for similar services to the sheriffs of the States, respectively, in which the service is rendered.[9] For each bail-bond, fifty cents.[10] For

[7] U. S. R. S., § 829.

[8] U. S. R. S., § 829.

[9] U. S. R. S., § 829; Pomeroy v. Harter, 1 McLean (Ind.), 448. Where a marshal who levied the execution has received his half commissions, his successor will be entitled to no more than his half commissions for collecting and paying it over. 15 Op. Atty. Gen. 346. The marshal is not entitled to fees where no property is sold nor any money received under an execution. Irwin v. Cummins, Hempst. 703. Otherwise where money is paid, though no sale is necessary. Pomeroy v. Harter, 1 McLean (Ind.), 448. The marshal cannot charge interest on his fees, although he may on his disbursemants. *Re* Donahue, 8 Bankr. Reg. 453. If the State court compensates services similar to those performed by a marshal, although not performed there by a like officer, the marshal is entitled to the same compensation. Pomeroy v. Harter, 1 McLean (Ind.), 448; The Trial, 1 Blatchf. & H. 94. When an execution against the person was issued in the county of New York, the defendant held under arrest for some time, and the action subsequently settled by a compromise, the defendants paying a smaller sum than that specified in the execution, it was held that the marshal was entitled to poundage on the whole amount for which the execution issued; and that the rate of poundage should be that allowed the sheriffs in the different counties throughout the State, and not the special rate allowed in the county of New York. U. S. v. Haas, 5 Fed. R. 29. In the Southern District of New York, where an execution was stayed and set aside for a defect appearing upon its face, it was held that the marshal who had made a levy was entitled to his fees, but to no poundage. Amato v. Jacobus (C. C. A.), 58 Fed. R. 855. When the marshal extends an execution on real estate for the government he is entitled to his fees for the same, though the land is not yet sold or redeemed, nor in any way converted into money. U. S. v. Smith, 44 Fed. R. 405. The fees for services of a deputy marshal belong legally to the marshal, and he controls them, and his receipt must operate as a discharge of the fees. Wintermute v. Smith, 1 Bond, 210. No fee is allowed for service of a writ or warrant unless actually executed. Ex parte Paris, 3 W. & M. 227. Mileage

[10] U. S. R. S., § 829.

summoning appraisers, fifty cents each.[11] For executing a deed by a party or his attorney, one dollar.[12] For drawing and executing a deed, five dollars."[13] The marshal cannot object to the purchaser drawing his own deed if he choose.[14] "For copies of writs or papers furnished at the request of any party, ten cents a folio.[15] For every proclamation in admiralty, thirty cents.[16] For serving an attachment *in rem* or a libel in admiralty, two dollars."[17] Where process *in rem* is issued against a vessel, but before process is served the claimant, waiving service, gives a bond under section 941 of the Revised Statutes, and the case proceeds to final decree, no actual seizure having been made by the marshal, he is still entitled to his fees on the settlement of the case.[18] It is not necessary that there should be a sale in order to entitle him to his fees.[19]

"For the necessary expenses of keeping boats, vessels, or other property attached or libeled in admiralty, not exceeding two dollars and fifty cents a day."[20] On delivering up the property the marshal may demand his fees of the person entitled to recover it.[21] He must take actual possession of the vessel, or he is not entitled to fees.[22] He may take such possession as to render him liable to the parties, and yet not be entitled to fees.[23] The marshal's actual expenses for ship-keeping must, by vouchers, etc., be established to be necessary to the satisfaction of the court.[24] The approval by the dis-

is to be computed from the place where the process is returned to the place of service. The "place of return" is the place where the process is issued. Matter of Crittenden, 2 Flip. 212. The marshal may charge poundage on the debt, if authorized by State laws, where an insolvent is discharged from imprisonment by the Secretary of the Treasury on payment of costs. Townsend v. U. S., 1 U. S. L. J. 534b. For cases in which the marshal is entitled to poundage, see U. S. v. Ringgold, 8 Pet. 150; Causin v. Chubb, 1 Cranch, C. C. 267; Ringgold v. Glover, 2 Cranch, C. C. 427; U. S. v. Smith, 3 Cranch, C. C. 66; Mason v. Muncaster, 3 Cranch, C. C. 403; Ringgold v. Lewis, 3 Cranch, C. C. 367; Swann v. Ringgold, 4 Cranch, C. C. 238.

[11] U. S. R. S., § 829.

[12] U. S. R. S., § 829.

[13] U. S. R. S., § 830.

[14] The John E. Mulford, 18 Fed. R. 455.

[15] U. S. R. S., § 829.

[16] U. S. R. S., § 829.

[17] U. S. R. S., § 829.

[18] The City of Washington, 13 Blatchf. 410.

[19] The Captain John, 41 Fed. R. 147.

[20] U. S. R. S., § 829.

[21] The Georgeanna, 31 Fed. R. 405.

[22] The Hibernia, 1 Sprague, 78.

[23] Ibid.

[24] The Free Trader, 1 Brown, Adm. 72.

trict attorney of the employment of extra keepers will not be sufficient to establish the right of the marshal to an allowance for the employment of such extra keepers.[25] Notwithstanding the limit named in this clause, the marshal will be allowed the extra cost of dockage of a vessel seized while on a marine railway from which she could not be removed without danger of sinking.[26] The libelant must get an order from the court directing the withdrawal of the keeper, if he would not be liable for keeper's fees should he lose the suit. Mere notice to the marshal is not enough.[27] If the parties agree that the vessel shall be four months in the marshal's charge, the sum actually paid a watchman by him is taxable as part of the costs, even though the claimant also had a keeper on the vessel.[28] Entry by the marshal into the bonded warehouse where the goods are stored, and levying of process against and affixing a notice of seizure upon such property, is an attachment upon the property within the meaning of the statute; and the custody fees of a keeper who visited the storehouse three times a day, though he did not enter, are taxable as costs.[29] The court will not allow pay for extra men employed by the marshal to prevent the collector of customs from taking by force property from his custody.[30] Nor will the court allow the marshal five dollars a day on the ground that two men were employed to watch,— one by day and one by night.[31] But two dollars and fifty cents a day is not the absolute limit, and more will be allowed in the case of danger from thieves, and in other emergencies requiring more than one man to guard the property; since the marshal is bound to protect from damage a vessel in his custody.[32] But when a marshal has done work in a defective manner, and additional labor becomes necessary in consequence, no compensation for the latter should be allowed.[33] A marshal, being the party served, is not entitled to fees for serving a warrant for the delivery of a vessel to the claimant issued upon a stipulation of the parties; but he is entitled to be reimbursed for any expenses he

[25] The Captain John, 41 Fed. R. 147, 149; The Perseverance, 22 Fed. R. 462.
[26] The Novelty, 9 Ben. 195.
[27] The Independent, 9 Ben. 489.
[28] The San Jacinto, 80 Fed. R. 266.
[29] Jorgensen v. Casks of Cement, 40 Fed. R. 606.
[30] The Perseverance, 22 Fed. R. 462.
[31] Ibid.
[32] Ibid.
[33] The Nellie Peck, 25 Fed. R. 468.

is put to on account of having been served with such warrant.[34] The cost of pumping out a vessel in charge of the marshal is properly allowed against the claimants in admiralty.[35] If, in the estimation of the court, it was, under the circumstances, prudent for the marshal to remove and insure property in his possession, he will be allowed the expenses necessarily incurred thereby.[36] And he should insure it with reference to its actual market value, irrespective of its original cost.[37] The marshal is also entitled to be reimbursed for his expenses in hiring wharfage for a vessel in his custody, when such a course appears to have been necessary.[38] If several processes are issued against one vessel, and the marshal has possession under all the processes, the *per diem* custody fees should be apportioned equally among the claimants, saving to the marshal, in case any party fails to pay his proper proportion, a remedy against the other parties for the amount.[39]

"When the debt or claim in admiralty is settled by the parties without a sale of the property, the marshal shall be entitled to a commission of one per centum on the first five hundred dollars of the claim or decree, and one-half of one per centum on the excess of any sum thereof over five hundred dollars: *Provided*, that, when the value of the property is less than the claim, such commission shall be allowed only on the appraised value thereof."[40] The word "claim" as here used applies equally to "a claim of forfeiture to the United States, in a proceeding *in rem* against a vessel," as well as to cases where the demand or claim is personal in its nature.[41] The sum paid a libelant in settlement of his claim, and not the amount claimed in the libel, is the basis upon which the marshal's commissions are to be determined.[42] The issuing of a process and the giving of a bond under section 941 of the Revised Statutes to the marshal will entitle him to his commissions in a suit *in rem* against a vessel under this clause, although the service of

[34] The Jeanie Landles, 17 Fed. R. 91.

[35] The Captain John, 41 Fed. R. 147.

[36] U. S. v. Three Hundred Barrels of Alcohol, 1 Ben. 72.

[37] Ibid.

[38] The Novelty (Steamboat), 9 Ben. 195. But see The F. Merwin, 10 Ben. 403.

[39] The Circassian, 6 Ben. 512; The John Walls, Jr., 1 Spr. 178.

[40] U. S. R. S., § 829.

[41] The Captain John, 41 Fed. R. 147, 151.

[42] Robinson v. Bags of Sugar, 35 Fed. R. 603; The Clintonia, 11 Fed. R. 740.

the process be waived and seizure of the vessel be not actually made. If the amount of the final decree is paid before execution, that is such a settlement of the claim as will entitle the marshal to his commissions.[43] So if part of the goods are sold or there is a part-payment in settlement, the marshal will be entitled to his commissions *pro rata*.[44] Where a vessel is sold by a trustee under the limited liability act, the marshal is not entitled to a commission.[45]

"For sale of vessels or other property under process in admiralty or under the order of a court of admiralty, and for receiving and paying over the money, two and one-half per centum on any sum under five hundred dollars, and one and one-quarter per centum on the excess of any sum over five hundred dollars."[46] The marshal is not authorized by law to employ an auctioneer to make sales under process or decree in admiralty; and if he employs one, he can make no charge for the services of such auctioneer which he could not otherwise have charged. Nor can he make such charge by a notice prior to the sale, that an auctioneer's fee will be required of the purchaser in addition to his bid.[47] Where a marshal has been paid his fees and commissions on the sale of a vessel under decree, and a claimant files a petition on which monition is issued, asking that the balance of the proceeds be paid to him, and the court so orders, the marshal cannot claim an additional commission on the amount paid by the claimant.[48] Upon an interlocutory sale of prize property, the marshal is entitled to full commission.[49] So if the property is removed to and sold in another district.[50] The marshal's title to commissions accrues at the time of the sale, and he is entitled to deduct his fees at the time when he pays the proceeds into court.[51] If, by agreement of parties, the vessel is sold outside of the territorial limits of the marshal's authority, he is, nevertheless, entitled to his fees.[52]

[43] The City of Washington, 13 Blatchf. 410. Compare Bone v. The Norma, Newb. Adm. 533. And see The Clintonia, 11 Fed. R. 740, citing The Russia, 5 Ben. 84; Robinson v. Bags of Sugar, 35 Fed. R. 603.

[44] Swann v. Ringgold, Cranch, C. C. 246.

[45] The Vernon, 36 Fed. R. 113.

[46] U. S. R. S., § 829.

[47] The John C. Mulford, 18 Fed. R. 455; Crofut v. Brandt, 13 Abb. Pr. (N. S.) 182.

[48] The Colorado, 21 Fed. R. 592.

[49] The Avery, 2 Gall. 308.

[50] The San Jose Indiano, 2 Gall. 311.

[51] The Avery, 2 Gall. 308.

[52] The San Jose Indiano, 2 Gall. 311.

"For travel, in going only, to serve any process, warrant, attachment, or other writ, including writs of subpœna in civil or criminal cases, six cents a mile, to be computed from the place where the process is returned to the place of service, or when more than one person is served therewith, to the place of service which is most remote, adding thereto the extra travel which is necessary to serve it on the others.[53] But when more than two writs of any kind required to be served in behalf of the same party on the same person might be served at the same time, the marshal shall be entitled to compensation for travel on only two of such writs; and to save unnecessary expense, it shall be the duty of the clerk to insert the names of as many witnesses in a cause in such subpœna as convenience in serving the same will permit."[54] "In all cases where mileage is allowed to the marshal he may elect to receive the same or his actual traveling expenses, to be proved on his oath to the satisfaction of the court."[55]

§ 333. Witnesses' fees.— A witness' fees are, "for each day's attendance in court, or before any officer pursuant to law, one dollar and fifty cents, and five cents a mile for going from his place of residence to the place of trial or hearing, and five

[53] U. S. R. S., § 829. The marshal is allowed mileage for actual travel in enabling him to make a return of *nulla bona*. Anon., Hempst. 450.

[54] U. S. R. S., § 829. See U. S. v. Harmon, 147 U. S. 268; U. S. v. Fletcher, 147 U. S. 664. He is not entitled to constructive mileage, and his actual traveling expenses must be divided among the causes in his hand to serve at the same time. Re Donahue, 8 Bankr. 453. Should the marshal arrest the wrong person, he is not entitled to fees of any kind; nor will he be allowed additional mileage for transporting a prisoner to a particular place by any other than the usual route of travel to that place. Matter of Crittenden, 2 Flippin, 212. He may charge actual expenses for serving a monition instead of the statutory mileage. The Wavelet, 25 Fed. R. 733.

[55] U. S. R. S., § 829. Generally the marshal should not be allowed any charges that are not expressly granted by statute. The John E. Mulford, 18 Fed. R. 455; Crofut v. Brandt, 13 Abb. Pr. (N. S.) 132; Bottomley v. U. S., 1 Story, 153; 9 Op. Atty. Gen. 98. When in an admiralty proceeding a reference is ordered to determine the amount of a marshal's fees, the expense must be borne by the claimant, even, it has been held, though the referee awards a sum less than the marshal's claim, and one which the claimant was at all times willing to pay. The Captain John, 41 Fed. R. 147. By 29 St. at L. 181–183, marshals are paid fixed salaries in lieu of fees by the United States.

cents a mile for returning."[1] When a witness is subpœnaed in more than one cause between the same parties, at the same court, only one travel fee and one *per diem* compensation are allowed for attendance.[2] Both are taxed in the case first disposed of, after which the *per diem* attendance fee alone is taxed in the other cases in the order in which they are disposed of.[3] When a witness is detained in prison for want of security for his appearance, he is entitled, in addition to his subsistence, to a compensation of one dollar a day.[4] A witness can be subpœnaed, and must be allowed mileage from and to his residence, in any part of a district, to attend a court held within that district,[5] or from another district if he does not reside more than one hundred miles from the place of trial.[6] The authorities conflict upon the question, whether when a witness in a civil case who resides more than one hundred miles from the place of trial voluntarily attends, his mileage for more than one hundred miles can be taxed.[7] The mile is computed upon

§ 333. [1] U. S. R. S., § 848. By 27 St. at L. 347, additional mileage is allowed for journeys not by railroad in some western states.

[2] U. S. R. S., § 848.

[3] U. S. R. S., § 848.

[4] U. S. R. S., § 848.

[5] The Syracuse, 36 Fed. R. 830; Sims v. Schult, 40 Fed. R. 143; Hunter v. Russell, 59 Fed. R. 964. But see Smith v. Chicago & N. W. Ry. Co., 38 Fed. R. 321; Holmes v. Sheridan, 1 Dill. 421, note. See Manufacturing Co. v. Saliers, 6 Cent. L. J. 82.

[6] U. S. R. S., § 876; The Syracuse, 36 Fed. R. 830.

[7] According to the rulings in the First Circuit, a witness is entitled to mileage from his residence, no matter how far distant it may be. Prouty v. Draper, 2 Story, 199; Whipple v. Cumberland Cotton Mfg. Co., 3 Story, 84; Hathaway v. Roach, 2 W. & M. 63; U. S. v. Sanborn, 28 Fed. R. 299; The City of Augusta (C. C. A.), 80 Fed. R. 297, 303. Even when he has not been served with a subpœna. U. S. v. Sanborn, 28 Fed. R. 299. It was held by the District Court for South Carolina that a witness for the United States, voluntarily coming to and attending court on the verbal instructions of the district attorney, is entitled to the *per diem* and mileage fees, although his residence is out of the district, and more than one hundred miles from the place at which the court is held. In re Williams, 37 Fed. R. 325. It has been held that, when the witness lives without the district, mileage for only one hundred miles can be taxed in the Second Circuit, Anon., 5 Blatchf. 134; Eastman v. Sherry, 37 Fed. R. 844; The Vernon, 36 Fed. R. 113; Haines v. McLaughlin, 29 Fed. R. 70; Buffalo Ins. Co. v. Prov. & Stonington S. S. Co., 29 Fed. R. 237; Wooster v. Hill, 44 Fed. R. 819; the Third Circuit, The Progresso, 48 Fed. R. 239; the Fourth Circuit in a civil case, Sloss I. & S. Co. v. South Carolina & G. R. Co., 75 Fed. R. 106; the Sixth Circuit, The Vernon, 36 Fed. R. 113; Burrow v. Kansas C., Ft. S. & M. R. Co., 54 Fed. R. 278; the

the shortest, most practical route, although the witness traversed a longer distance.[8] A witness does not lose his right to his fees merely because he was not subpœnaed, if his attendance and examination were procured in good faith.[9] Nor if he attend, but is not examined;[10] nor, it seems, if he is required to attend at the hearing after his deposition has been taken;[11] nor does he suffer any abatement of them, because he is summoned to attend at the same time to testify in several suits, whenever some but not all the parties are the same;[12] not even if both suits are tried together and the witness is examined but once, provided no order consolidating the suit has been obtained. In all such cases the fees, if paid, can be taxed, provided the witnesses were in good faith asked to attend.[13] When the trial is postponed because of the illness of counsel,[14] or delay in the transmission of a deposition taken by the other side,[15] and the witnesses are required to remain during the postponement, they must be paid for the intervening time. So, also, when the witnesses are required to remain after their examination to the end of the hearing.[16] Fees for travel of a witness in going and returning can only be taxed once for each occasion of taking testimony, although each occasion em-

Seventh Circuit, where it was held that in such a case no fees or mileage could be taxed, Dreskill v. Parish, 5 McLean, 218. See Smith v. Chicago & N. W. Ry. Co., 38 Fed. R. 321; the Eighth Circuit, Pinson v. Atchison, T. & S. F. R. Co., 54 Fed. R. 464; and the Ninth Circuit, Spaulding v. Tucker, 2 Sawyer, 50; Haines v. McLaughlin, 29 Fed. R. 70.

[8] Hunter v. Russell, 59 Fed. R. 964.

[9] Anderson v. Moe, 1 Abb. (U. S.) 299; U. S. v. Sanborn, 28 Fed. R. 299; The Vernon, 36 Fed. R. 113; The Syracuse, 36 Fed. R. 830; Eastman v. Sherry, 37 Fed. R. 844; Simpkins v. Atchison, T. & S. F. R. Co., 61 Fed. R. 999; Sloss I. & S. Co. v. S. C. & G. R. Co., 75 Fed. R. 106; Hanchett v. Humphrey, 93 Fed. R. 895. *Contra*, Haines v. McLaughlin, 12 Sawyer, 126; Lilienthal v. Southern Cal. Ry. Co., 61 Fed. R. 622.

[10] Clark v. Am. Dock & I. Co., 25 Fed. R. 641; Hathaway v. Roach, 3 W. & M. 63; Sloss I. & S. Co. v. S. C. & G. R. Co., 75 Fed. R. 106. *Contra*, Simpkins v. Atchison, T. & S. F. R. Co., 61 Fed. R. 999.

[11] Beckwith v. Easton, 4 Ben. 357; Anderson v. Moe, 1 Abb. (U. S.) 299.

[12] Parker v. Bigler, 1 Fish. 285; The Vernon, 36 Fed. R. 113; Archer v. Hartford F. Ins. Co., 31 Fed. R. 660. But see Simpkins v. Atchison, T. & S. F. Ry. Co., 61 Fed. R. 999.

[13] The Vernon, 36 Fed. R. 113; Archer v. Hartford F. Ins. Co., 31 Fed. R. 660.

[14] Whipple v. Cumberland C. Mfg. Co., 3 Story, 84.

[15] Hunter v. Russell, 59 Fed. R. 964.

[16] Whipple v. Cumberland C. Mfg. Co., 3 Story, 84.

braces a number of days;[17] unless his second attendance was required by an adjournment caused by the fault of the unsuccessful party, when his traveling fees may be taxed for his attendance at such adjourned day if incurred.[18] Witnesses summoned and attending court are entitled to their mileage and *per diem* fees if the cause was docketed and could have been tried at the term at which the witnesses attended.[19] If a witness is subpœnaed at the place of trial on the day when the subpœna requires him to attend, he is not entitled to any mileage.[20] Where witnesses were subpœnaed to testify to a particular point, though the opposite party admitted the point, mileage and *per diem* fees up to the time of such admission were allowed;[21] and a second trial being had, and no stipulation or entry made on the record that the point would be admitted at such second trial, such *per diem* and mileage fees were allowed for attendance at that trial also.[22] But it has been held, on the other hand, that a party may not tax the fees of a witness whom he has subpœnaed, but whose testimony is either abandoned or stricken out;[23] nor may he tax the fees of more than three witnesses to a single fact;[24] nor fees and mileage for himself when he testifies in his own behalf;[25] nor fees which he has not paid.[26] It has been held that

[17] Spill v. Celluloid Mfg. Co., 28 Fed. R. 870.

[18] Hake v. Brown, 44 Fed. R. 734.

[19] Young v. Merchants' Ins. Co., 29 Fed. R. 273.

[20] The Sunnyside, 5 Ben. 162.

[21] Young v. Merchants' Ins. Co., 29 Fed. R. 273.

[22] Ibid.

[23] Troy I. & N. Factory v. Corning, 7 Blatchf. 16.

[24] Bussard v. Catalino, 2 Cranch, C. C. 521.

[25] Nichols v. Brunswick, 3 Cliff. 88; Roundtree v. Rembert, 71 Fed. R. 255. *Contra*, Tuck v. Olds, 29 Fed. R. 883, W. D. Mich.

[26] Leary v. Miranda, 40 Fed. R. 607; O'Neil v. Kansas City S. & M. R. Co., 31 Fed. R. 663. A witness subpœnaed by the prevailing party to the suit cannot upon his own motion have his fees that remain unpaid taxed in the bill of costs against the losing party; and it seems that a party cannot have such fees taxed until he has paid the witness, either before or after the service has been rendered, and before judgment for costs. O'Neil v. Kansas City S. & M. R. Co., 31 Fed. R. 663. But it has been held that witnesses do not lose their right to mileage and *per diem* fees by not insisting upon prepayment; nor by the fact that they were in attendance on the court in another cause between different parties, and received *per diem* and mileage fees therefor. Young v. Merchants' Ins. Co., 29 Fed. R. 273. It has been held that when a person has been served with a subpœna and has received money for traveling expenses, he cannot refuse to obey such subpœna because the proper amount of mileage has not been

fees and mileage may be taxed for the attendance as witnesses of officers of a corporate defendant,[27] but not where a defendant corporation was ordered to account before a master in a suit for an infringement of a patent.[28] Only the necessary expenses of a government clerk sent away from his place of business as a witness for the government will be paid, and nothing can be taxed in the bill of costs for his travel or attendance.[29] The same rule applies to deputy-clerks, as they are also officers of the court.[30] But clerks employed by the marshal in his office, keeping his accounts, are not officers of the court, and are entitled to fees and mileage.[31] A deputy-marshal is an officer of the court; but unless he is actually engaged in attendance upon the court, he is entitled to *per diem* fees and mileage, if summoned as a witness by the government.[32] Where a party has paid some witnesses more and some less than the legal fees, he cannot group together the amounts so paid and collect the legal fees for all.[33]

§ 334. Miscellaneous disbursements.— The Revised Statutes provide that "the bill of fees of the clerk, marshal, and attorney, and the amount paid printers and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trials in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court, and be included in and form a portion of a judgment or decree against the losing party. Such taxed bills shall be filed with the papers in the cause."[1] The Federal courts are not absolutely limited in the taxation of costs to such items as are specifically named in the statute.[2] Disbursements for printing the record, evidence, and other papers in a suit in equity in a Circuit Court, when required by rule, are, at least

paid; and that persons subpœnaed as witnesses in the courts of the United States, if they have the means, are obliged to obey whether their fees are advanced or not. Norris v. Hassler, 23 Fed. R. 581; U. S. v. Durling, 4 Biss. 509, 510; Hake v. Brown, 44 Fed. R. 734.

[27] Wead v. Millersburg H. W. Co., 79 Fed. R. 129.

[28] Am. Diamond Drill Co. v. Sullivan Mach. Co., 32 Fed. R. 552.

[29] U. S. R. S., § 850; U. S. R. S., § 849; U. S. v. Sanborn, 28 Fed. R. 299.

[30] Ex parte Burdell, 32 Fed. R. 681.

[31] Ibid.

[32] Ibid.

[33] Burrow v. Kansas City, F. S. & M. R. Co., 54 Fed. R. 258.

§ 334. [1] U. S. R. S., § 983.

[2] Spaulding v. Tucker, 2 Sawyer, 50; Gunther v. Liverpool, L. & G. Ins. Co., 10 Fed. R. 830.

in the First and Second Circuits, taxable as costs.[3] Disbursements for printing testimony and other papers of the court, when not required by rule or special order, cannot be taxed.[4] The appellant or plaintiff in error, when allowed costs, may tax his disbursements for clerk's fees and for printing the record.[5] Where, upon an appeal from a decree dismissing a bill which was affirmed with costs, the defendant had taken a cross-appeal from the dismissal of his cross bill, which appeal was dismissed, the cross-appellant was allowed to tax the fees paid for one-half the cost of printing the record.[6] Where the costs of printing the record on an appeal had been paid by a receiver under an order out of the fund in his hands, the defendant who finally succeeded was allowed to tax these disbursements,[7] but not the receiver's fees and the necessary disbursements incidental to the receivership.[8] Disbursements for printing objections to a petition to the Supreme Court in its original jurisdiction, for a writ of mandamus, are taxable.[9] Disbursements for printing briefs on appeal, in error, or in original proceedings in the Supreme Court or Circuit Courts of Appeals, are not taxable.[10] Disbursements for printing briefs which the rules require to be printed are taxable in the Circuit Courts in the Second Circuit,[11] even when the brief is printed after the argument.[12] If copies of papers, necessarily obtained for use on the trial, are put in evidence, and no order is made rejecting them as evidence, it is the duty of the clerk to allow, on taxation, the disbursements paid for the various copies put in evidence

[3] Jordan v. Agawam Woollen Co., 8 Cliff. 239; Dennis v. Eddy, 12 Blatchf. 195; Hake v. Brown, 44 Fed. R. 734. *Contra*, Lee v. Simpson, 42 Fed. R. 484.

[4] Atwood v. Jaques, 63 Fed. R. 561; Spaulding v. Tucker, 2 Saw. 50.

[5] Supreme Court Rule 10; Circuit Court of Appeals Rule 23. But the expense of printing superfluous papers will be disallowed. B. & S. F. Co. v. Kraetzer, 150 U. S. 111; *infra*, § 490. *E. g.*, no costs were allowed for printing the record upon a motion for a new trial. Nederland L. I. Co. v. Hall, 86 Fed. R. 741.

[6] Nichols, Shepard & Co. v. Marsh, 131 U. S. 401.

[7] Ferguson v. Dent, 46 Fed. R. 88, 94.

[8] Ferguson v. Dent, 46 Fed. R. 88, 96; Elk F. O. & G. Co. v. Jennings, 90 Fed. R. 767.

[9] Ex parte Hughes, 114 U. S. 548; Gird v. California Oil Co., 60 Fed. R. 1011.

[10] Ibid.

[11] Hake v. Brown, 44 Fed. R. 734; Dennis v. Eddy, 12 Blatchf. 195. Not in the Ninth Circuit, where the rules do not direct that briefs be printed. Gird v. California Oil Co., 60 Fed. R. 1011.

[12] Sackett v. Smith, 46 Fed. R. 39.

and forming part of the record for final hearings.[13] It has been held that fees paid for certified copies of a party's own muniments of title cannot be taxed, since he is presumed to have the originals in his possession, unless he proves the contrary; but that he may tax fees paid for transcripts of records of suits and other papers on which he relied to defeat his adversary's claim of title.[14] Copies of papers obtained for use on interlocutory or preliminary or incidental motions or hearings are not obtained for use on trials, and disbursements in procuring them have been disallowed.[15] Disbursements taxable in a State court may when made be taxed in an action at common law in a Federal Court held in the same State.[16] The legal fees paid to masters,[17] commissioners,[18] and examiners[19] can be taxed. Fees paid an attorney for the examination of a witness before a master or special examiner,[20] payments to an attorney for traveling expenses,[21] payments to messengers,[22] payments to witnesses for services in examining property concerning which they afterwards testified,[23] cannot be taxed. Disbursements for surveys and plans necessitated by an order to make a pleading more definite and certain, cannot be,[24] but the cost of maps necessarily used on a trial have been taxed.[25] Disburse-

[13] Wooster v. Handy, 23 Fed. R. 49.

[14] Ford v. Louisville, N. O. & T. Ry. Co., 45 Fed. R. 210. The cost of copies of testimony obtained solely for the use of counsel in preparing for trial, Tesla El. Co. v. Scott, 101 Fed. R. 524; Atwood v. Jaques, 63 Fed. R. 561; or for use in preparing a bill of exceptions, Monehan v. Godkin, 100 Fed. R. 196, were held not to be taxable.

[15] Wooster v. Handy, 23 Fed. R. 49. In the Second Circuit fees paid for copies of opinions for use in preparing orders are usually taxed. In the Sixth Circuit the notarial fees paid for affidavits on a motion are taxed, but not the expense of writing the affidavits in the form of depositions. Atwood v. Jaques, 63 Fed. R. 561.

[16] Huntress v. Epsom, 15 Fed. R. 732.

[17] *Supra*, § 314.

[18] *Supra*, § 331; Tesla El. Co. v. Scott, 101 Fed. R. 524.

[19] In the Second Circuit examiner's fees are three dollars a day, and thirty cents a folio for typewriting the testimony. Edison El. L. Co. v. Mather Electric Co., 63 Fed. R. 559. Where the Federal court appointed a stenographer a special examiner, he was allowed the fees paid by the State practice for similar services. Indianapolis Water Co. v. American S. B. Co., 65 Fed. R. 534. But see Jerman v. Stewart, 12 Fed. R. 271.

[20] Strauss v. Meyer, 22 Fed. R. 467.

[21] Wooster v. Handy, 23 Fed. R. 49.

[22] Ibid.

[23] Tuck v. Olds, 29 Fed. R. 883.

[24] New Hampshire L. Co. v. Tilton, 29 Fed. R. 764.

[25] Lilienthal v. Southern Cal. Ry. Co., 61 Fed. R. 622.

ments for copies of models in the Patent Office used as evidence are taxable,[26] but not disbursements for other models.[27] It has been held that notarial fees for presentment and protest of a note, though paid before suit was brought, are considered as costs, not as damages.[28] When the defendant finally prevailed, and a decree directing him to account was set aside, he was allowed to include in his bill of costs the fees which he had been obliged to pay the master.[29] A defendant who finally prevails cannot tax the costs he has paid upon the overruling of his demurrer to the bill.[30]

§ 335. Costs out of the fund.— Costs are paid out of a fund or estate in the course of distribution by a court of equity, to trustees who have been obliged to engage in litigation for the benefit of the estate, and to persons who have been successful in suits brought by them on behalf of themselves and others similarly situated.[1] The expression "trustees" is used here in the broadest sense of the word, as including not only those appointed by a deed of trust, but also agents, receivers,[2] and personal representatives.[3] All of these, when under a bill for an accounting they account fairly and pay the balance due from them into court, are entitled to their costs,[4] provided that they have not acted unconscientiously in the suit[5] or in the previous administration of their trust.[6] The same is true when a suit is honestly commenced by one of them for the directions of the court concerning his trusteeship.[7] But in suits brought by or against any of them, except possibly receivers, to which a stranger is a party, they are usually, if unsuccessful, liable

[26] Wooster v. Handy, 23 Fed. R. 49.

[27] Ibid.

[28] Baker v. Howell, 44 Fed. R. 113; *supra*, § 16.

[29] American D. D. Co. v. Sullivan M. Co., 32 Fed. R. 552.

[30] New York B. & P. Co. v. N. J. C. S. & R. Co., 32 Fed. R. 755. For the costs of a receivership, see *supra*, § —.

§ 335. [1] Cowdrey v. Galveston, H. & H. R. Co., 93 U. S. 352; Trustees v. Greenough, 105 U. S. 527; Central R. & B. Co. v. Pettus, 113 U. S. 116.

[2] Atty. Gen. v. City of London, 1 Ves. Jr. 243; s. c., 3 Bro. C. C. 171; Curteis v. Candler, Mad. & Geld. 123; Stuart v. Boulware, 133 U. S. 78.

[3] Rashleigh v. Master, 1 Ves. Jr. 201; Samuel v. Jones, 2 Hare, 246.

[4] Atty. Gen. v. City of London, 1 Ves. Jr. 243; s. c., 3 Bro. C. C. 171; Rashleigh v. Master, 1 Ves. Jr. 201; Samuel v. Jones, 2 Hare, 246; Curteis v. Candler, Mad. & Geld. 123.

[5] Henley v. Philips, 2 Atk. 48; Lloyd v. Spillat, 3 P. Wms. 344, 346.

[6] Howard v. Rhodes, 1 Keen, 581; O'Callahan v. Cooper, 5 Ves. 117, 129; Hide v. Haywood, 2 Atk. 126.

[7] Hicks v. Wrench, Mad. & Geld. 93; Henley v. Philips, 2 Atk. 48.

personally to him for the costs as between party and party,[8] which costs, together with the expenses of the suit, will be allowed them upon their accounting,[9] if the suit was prosecuted or defended in good faith for the benefit of their trust.[10] Costs will also be paid out of a fund under the control of a court of equity to persons who have been successful in a suit concerning it, brought by them in behalf of themselves and others similarly situated with them.[11] Instances of this are a suit brought by a single creditor for a general administration of assets,[12] and by a single beneficiary of a trust to prevent a loss to the trust estate.[13] Costs have been allowed in a similar case to a party who by his litigation had benefited the fund, although he eventually failed to collect his own claim against it.[14] Such costs are, in the distribution of the fund, paid before all claims against it, except those of trustees who have not been guilty of misconduct.[15] The same rule applies to a suit brought by a single creditor of the estate against an executor or administrator for the satisfaction of his own claim.[16] In such cases the personal representative can only recover his costs from that part of the estate which remains after the complainant has been paid the full amount of his claim with costs,

[8] Edwards v. Harvey, G. Cooper, 40; Poole v. Franks, 1 Molloy, 78; Westley v. Williamson, 2 Molloy, 458. See § 251. But see Tug R. C. & S. Co. v. Brigel (C. C. A.), 70 Fed. R. 647, cited *supra*, § 327.

[9] Cowdrey v. Galveston, H. & H. R. Co., 93 U. S. 352; Humphrys v. Moore, 2 Atk. 108.

[10] Henley v. Philips, 2 Atk. 48; Lloyd v. Spillat, 3 P. Wms. 344, 346; Central Tr. Co. v. Valley R. Co., 55 Fed. R. 903.

[11] Trustees v. Greenough, 105 U. S. 527; Central R. & B. Co. v. Pettus, 113 U. S. 116; Ex parte Jaffray. In re Waite & Crocker, 1 Low. 321; Ex parte Plitt, 2 Wall. Jr. 453; Stewart v. C. & O. C. Co., 5 Fed. R. 149.

[12] Bennet v. Going, 1 Molloy, 527; Hare v. Rose, 2 Ves. Sen. 558. See, however, Mason v. Codwise, 6 J. Ch. (N. Y.) 183.

[13] Trustees v. Greenough, 105 U. S. 527; Stewart v. C. & O. C. Co., 5 Fed. R. 149.

[14] Ex parte Plitt, 2 Wall. Jr. 453; Fechheimer v. Baum, 43 Fed. R. 719, 730; Central Tr. Co. v. Condon (C. C. A.), 67 Fed. R. 84, 111; D. G. Tompkins Co. v. Chester Mills, 90 Fed. R. 37. But see Weed v. Central Ga. Ry. Co., 100 Fed. R. 162. See U. S. v. Boyd, 79 Fed. R. 858. In such a case, where the order appointing the receiver was reversed, the allowance of compensation to the solicitor who procured the appointment was also set aside. Jacksonville, T. & K. W. Ry. Co. v. American Const. Co., 57 Fed. R. 66.

[15] Bennet v. Going, 1 Molloy, 529.

[16] Humphrys v. Moore, 2 Atk. 108; Davy v. Seys, Moseley, 204.

even though the creditor thus sweeps away the entire estate.[17] Not so, however, when a bill is filed by one creditor in behalf of himself and the rest for a general administration of assets; in which case the personal representative is always entitled to his costs out of the fund unless he has forfeited them by his misconduct.[18] Where the laches or inaction of the trustee under a mortgage has caused a suit by a bondholder or a junior incumbrancer to preserve the mortgaged property, and his action in the suit has been of no special value to the fund, he may be disallowed compensation from the fund until after satisfaction of the beneficiaries who appeared by their own counsel in the suit.[19]

§ 336. Costs as between solicitor and client.— Costs payable out of a fund in court are termed costs as between solicitor and client.[1] Costs as between solicitor and client include all reasonable expenses and counsel fees, and are not, like costs as between party and party, confined to the amount named in the statute.[2] Five per centum of the fund collected was held a reasonable counsel fee in such a case, when the fund was large,— that is, more than seventy-five thousand dollars.[3] Ten per centum of the fund collected was held a reasonable counsel fee in such a case, when the fund was less.[4] In no case,

[17] Adair v. Shaw, 1 Sch. & Lef. 243; 280; Uvedale v. Uvedale, 3 Atk. 117.

[18] Bennet v. Going, 1 Molloy, 529; Young v. Everest, 1 R. & M. 426; Minuse v. Cox, 5 J. Ch. (N. Y.) 441.

[19] See D. A. Tompkins Co. v. Chester Mills, 90 Fed. R. 37; Bound v. South Carolina Ry. Co., 59 Fed. R. 509.

§ 336. [1] Trustees v. Greenough, 105 U. S. 527.

[2] Trustees v. Greenough, 105 U. S. 527; Cowdrey v. G., H. & H. R. Co., 93 U. S. 352; Ex parte Jaffray, In re Waite & Crocker, 1 Low. 321; Ex parte Plitt, 2 Wall. Jr. 458.

[3] Fechheimer v. Baum, 43 Fed. R. 719; Central R. & B. Co. v. Pettus, 113 U. S. 116, 128. Where counsel were paid $2,000 for disbursements and it was agreed that their compensation should be liberal in case of success, it was held that one-third of the fund collected, $91,420, should be allowed them. Frink v. McComb, 60 Fed. R. 486. Twenty per cent. of $25,000 was held to be a reasonable contingent fee when the amount not specified in the agreement between client and attorney. St. Louis, I. M. & S. Ry. Co. v. Clark, 51 Fed. R. 483. Where an attorney had asked for a payment on account, it was held that he had not thereby waived his contract right to a liberal contingent fee. Frink v. McComb, 60 Fed. R. 486.

[4] Where the amount collected was $35,869.77, the plaintiff's counsel was allowed ten per cent. thereof. Harrison v. Perea, 168 U. S. 311, 317. See also Adams v. Kepler M. Co., 38 Fed. R. 281. As to the extent of an attorney's lien, see Mass. & So. Const. Co.

however, will the personal expenses and compensation for the personal services of a person, not a trustee, who has engaged in litigation in behalf of himself and others, be included in them.[5]

§ 337. Taxation of costs.— Costs as between party and party are taxed by a judge or clerk of the court upon notice to the adverse party, and are included in and form a portion of the judgment or decree.[1] To each bill of costs should be attached an affidavit by some person acquainted with the facts, stating that the services for which fees are charged were performed.[2] It has been said that the court will not on the taxation enforce a stipulation that disbursements not allowed by rule or statute may be included in the bill of costs.[3] The bills when taxed must be filed with the papers in the cause.[4] When the taxation is by the clerk, a motion for a retaxation of the costs may be made before, or an appeal taken to, a judge of the court.[5] A party who objects to a charge in lump should demand a specification of the items of which it is composed.[6] Where there is a dispute as to a question of fact, material to the taxation of a bill of costs, a reference may be had to an auditor.[7] Costs as between solicitor and client are taxed by the court, usually by means of a reference to a master.[8] It has been held that a Circuit Court of Appeals may reverse a decree for an error in taxing costs as between party and party.[9] An appeal lies from a decree awarding costs as between solicitor and client.[10] Upon such an appeal, the court may re-

v. Tp. of Gill's Creek, 48 Fed. R. 145; Claflin v. Bannett, 51 Fed. R. 693; Coe v. Western R. Co., 65 Fed. R. 16. A State statute regulating the allowances in a partition suit was followed by a Federal court of equity. Willard v. Serpell, 62 Fed. R. 625.

[5] Trustees v. Greenough, 105 U. S. 527.

§ 337. [1] U. S. R. S., § 983.

[2] U. S. R. S., § 984; Jerman v. Stewart, 12 Fed. R. 271.

[3] Lee v. Simpson, 42 Fed. R. 434.

[4] U. S. R. S., § 983.

[5] Re Strauss v. Meyer, 22 Fed. R. 467; Tuck v. Olds, 28 Fed. R. 883.

[6] Dedekam v. Vose, 3 Blatchf. 153.

[7] Bottomley v. U. S., 1 Story, 153.

[8] Trustees v. Greenough, 105 U. S. 527; Central R. & B. Co. v. Pettus, 113 U. S. 116; Cowdrey v. G., H. & H. R. Co., 93 U. S. 352.

[9] The City of Augusta (C. C. A.), 80 Fed. R. 297, 307, citing O'Reilly v. Morse, 15 How. 62, 124; Burns v. Rosenstein, 135 U. S. 449, 456. But see Du Bois v. Kirk, 158 U. S. 58, 67; Gamewell F. A. Tel. Co. v. Municipal Signal Co. (C. C. A.), 77 Fed. R. 490; Blanks v. Klein (C. C. A.), 78 Fed. R. 395, and cases there cited.

[10] Where the Supreme Court affirmed a decree with costs of the Circuit Court as well as of the Supreme Court, it was held that the Circuit Court had no power to grant costs

verse the decree if the costs have been awarded upon erroneous principles;[11] but will very rarely do so merely because it considers the sum allowed for a counsel fee too large.[12]

§ 338. Security for costs.— A complainant who does not reside within the district may be compelled to give security for costs.[1] Such security may also be required of a non-resident defendant to a bill of interpleader when he takes aggressive action.[2] In order to obtain an order compelling such security, the defendant must move for it as soon as he ascertains the plaintiff's residence.[3] If he takes after such discovery any step in the cause before moving, it seems that he thereby waives his right to security,[4] unless a necessity for unforeseen disbursements, such as the expense of a reference, subsequently arises.[5] Upon a failure to file security when required, the plaintiff's proceedings will be stayed.[6] A plaintiff's proceedings may also be stayed until he pays the costs of another suit between the same parties upon the same cause of action in which he was unsuccessful, even if that other suit was in a State court,[7] or a Federal court in another district,[8] and, it has been held, when the other suit was *in forma pauperis*.[9] When one of several plaintiffs is a resident of the district, it seems that no security for costs will be required.[10] If the defendant do not demand security for costs within a reasonable time, that such security has not been given will not, when the cause is called for trial,

as between solicitor and client out of the fund. Mason v. Pewabic Mining Co., 153 U. S. 361, 366.

[11] Trustees v. Greenough, 105 U. S. 527; Central R. & B. Co. v. Pettus, 113 U. S. 116.

[12] Trustees v. Greenough, 105 U. S. 527; Stuart v. Boulware, 133 U. S. 78; Sloan v. Mitchell (C. C. A.), 72 Fed. R. 89. But see Central R. & B. Co. v. Pettus, 113 U. S. 116.

§ 338. [1] Lyman V. & R. Co. v. Southard, 12 Blatchf. 405. But see Woodworth v. Sherman, 3 Story, 171. The Minnesota rule requiring the plaintiff in every case to give security for costs means only the clerk's costs. Robinson v. Honstain, 79 Fed. R. 678.

[2] Gross & Phillipps Mfg. Co. v. Gerhard, 8 Rep. 136.

[3] Migliorucci v. Migliorucci, 1 Dick. 147; Foster v. Swasey, 2 W. & M. 217; Bliss v. Brooklyn, 10 Blatch. 217; Prince v. Towns, 33 Fed. R. 161.

[4] Migliorucci v. Migliorucci, 1 Dick. 147; Foster v. Swasey, 2 W. & M. 217; Bliss v. Brooklyn, 10 Blatchf. 217; Prince v. Towns, 33 Fed. R. 161. But see Stewart v. The Sun, 36 Fed. R. 307.

[5] Uhle v. Burnham, 46 Fed. R. 500.

[6] Fox v. Blew, 5 Madd. 147.

[7] Buckles v. C., M. & St. P. R. Co., 47 Fed. R. 424.

[8] Kimble v. Western Union Tel. Co., 70 Fed. R. 888.

[9] Ibid.

[10] Winthrop v. Royal Exch. Ass. Co., 1 Dickens, 282; Walker v. Easterby, 6 Ves. 612; Gilbert v. Gilbert, 2 Paige Ch. (N. Y.) 603.

be a ground for a continuance.[11] Where a plaintiff has recovered judgment against a solvent defendant, and process is outstanding in the nature of an execution to collect the same, it is not proper to require the plaintiff to make a deposit to secure costs due a commissioner.[12] It was held in New York, by Chancellor Kent, that a person who sued in another's right, as an executor or administrator, could not be compelled to give security for costs;[13] but the receiver of a national bank appointed by the Comptroller, when suing in another district, has been compelled to file security for costs.[14] The United States and parties suing or defending under the direction of any Department of the government are by statute exempted from liability to give security for costs, at least upon appeals and writs of error.[15] Persons allowed to sue *in forma pauperis* are not obliged to file security for costs originally or on appeal.[16] The usual security required is a bond or undertaking with a sufficient surety for two hundred and fifty dollars,[17] but the plaintiff may at any stage of the case be obliged to file additional security.[18] In one case a bond for two thousand dollars was required.[19] In the District of Ohio it is held that a surety to a bond is a party to the suit, and that his liability can be enforced by summary proceedings after the final decree; that the statute of limitations does not begin to run in his favor until the final decree; and that security "for costs" includes the costs of an appeal.[20] Where a State statute made the indorser of a writ liable for the costs, it was held that he remained liable for costs in both State and Federal courts after a removal.[21]

[11] Hawkins v. Willbank, 4 Wash. 285.

[12] U. S. v. St. Charles Co., 31 Fed. R. 442.

[13] Goodrich v. Pendleton, 3 J. Ch. (N. Y.) 520. See Cathcart v. Hewson, 1 Hayes, 173.

[14] Platt v. Adriance, 90 Fed. R. 772.

[15] U. S. R. S., § 1001. The costs are paid out of the contingent fund of the department which authorized the suit, defense or appeal.

[16] 27 St. at L., 252; Boyle v. Great N. Ry. Co., 63 Fed. R. 539; *supra*, § 200.

[17] Deprez v. Thomson-Houston El. Co., 66 Fed. R. 22.

[18] Ibid.

[19] Ibid.

[20] M'Claskey v. Barr, 79 Fed. R. 408.

[21] Pullman's Palace Car Co. v. Washburne, 66 Fed. R. 790.

CHAPTER XXVI.

ENFORCEMENT OF DECREES AND ORDERS.

§ 339. Enforcement of decrees and orders in general.— Decrees and orders are enforced in seven ways: by writ of execution,[1] by attachment,[2] by writ of sequestration,[3] by writ of assistance,[4] by the action of the court itself through the medium of a master[5] or receiver,[6] and by bills to carry decrees into execution.[7] Equity Rule 10 provides as follows: "Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause; and every person not being a party in any cause, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such orders as if he were a party in the cause."

§ 340. Executions.— The rules provide that "final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the Circuit Court in suits at common law in actions of *assumpsit*."[1] A decree for a deficiency after a sale of mortgaged property in a foreclosure suit is enforced in the same manner.[2] By a statute passed June 1, 1872, and re-enacted December 1, 1873, "the party recovering a judgment in any common-law cause in any Circuit or District Court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the State in which such court is held, or by any such laws hereinafter enacted which are adopted by general rules of such Circuit or District Court; and such courts

§ 339. [1] §§ 340, 380.
[2] §§ 341–346.
[3] § 347.
[4] § 348.
[5] § 349.
[6] Ch. XVII.
[7] § 349*a*.

§ 340. [1] Rule 8. See § 380.
[2] Rule 92.

may, from time to time, by general rules, adopt such State laws as may hereafter be in force in such State in relation to remedies upon judgments, as aforesaid by execution or otherwise."[3] In cases where an appeal lies to or a writ of error may issue from the Supreme Court,[4] or from a Circuit Court of Appeals,[5] the execution cannot issue until the expiration of ten days from the entry of the decree or judgment. The writ may, however, be previously prepared by the clerk.[6] The marshal in the courts of the United States has duties analogous to those of the sheriff in the different States.[7] It is his duty "to attend the District and Circuit Courts when sitting in his district, and to execute throughout the district all lawful precepts directed to him, and issued under the authority of the United States; and he shall have power to command all necessary assistance in the execution of his duty."[8] He has the right under the direction of the Attorney-General to protect judges of the courts of the United States while in the discharge of their official duties, and while on their way to hold court, and if necessary, to take human life in their defense.[9] "The marshals and their deputies have, in each State, the same powers in executing the laws of the United States, as the sheriffs and their deputies in such State have by law, in executing the laws thereof."[10] Under these provisions of the Revised Statutes, the marshal or his deputy, if resisted when in the performance of his duty, may call to his aid a sufficient force from his district, called the *posse comitatus*, or power of his county, from the corresponding force which the sheriff or county officer has at his command,[11] — that is, such number of men as are necessary for his assistance in the execution of the writs of the United States; and therein every person above the age of fifteen and able to travel is bound to be aiding, and if they re-

[3] U. S. R. S., § 916. See Lamaster v. Keeler, 123 U. S. 376; and *infra*, § 380.

[4] U. S. R. S., § 1008.

[5] Danielson v. Northwestern Fuel Co., 55 Fed. R. 49.

[6] Board of Com'rs v. Gorman, 19 Wall. 661.

[7] In re Neagle, 135 U. S. 1; s. c., 39 Fed. R. 833; U. S. R. S., § 788.

[8] U. S. R. S., § 787.

[9] In re Neagle, 135 U. S. 1; s. c., 39 Fed. R. 833.

[10] U. S. R. S., § 788; In re Neagle, 135 U. S. 1, 68. It has been held that this gives to the marshals the same and no more power to arrest without a warrant than is conferred by the State statutes upon the said officers. In re Acker, 66 Fed. R. 290, 294.

[11] 6 Op. Atty. Gen. 466, 469.

fuse to assist, may be punished by fine and imprisonment.[12] It has been said, that this force by the common law included all persons, whatever might be their occupation, whether civilians or not; and including the military of all denominations,— militia, soldiers, marines,— all of whom were alike bound to obey the commands of a sheriff or marshal. "The fact that they are organized as military bodies, under the immediate command of their own officers, does not in any wise affect their legal character. They are still the *posse comitatus*."[13] An act of Congress has, however, provided, that "it shall not be lawful to employ any part of the army of the United States as a *posse comitatus*, or otherwise for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress."[14] Under this statute, it seems that the aid of the army cannot be obtained by a marshal unless the President shall employ it to suppress insurrection after a proclamation commanding the insurgents to disperse.[15] The marshal and his deputies may carry arms and use force in the execution of their official duty although a State statute forbids carrying concealed weapons;[16] but they may not make arrests nor carry arms outside of the districts for which they are appointed.[17] All writs of execution upon judgments or decrees obtained in a Circuit or District Court, in any State which is divided into two or more districts, may run and be executed in any part of such State; but must be issued from and made returnable to the court wherein the judgment was obtained.[18] In such a case, the writ may be executed, by the marshal of the district from which it was issued, in the other district without any independent writ being directed to him for that purpose.[19] All writs of execution upon judgments obtained for the use of the United States, in any court thereof, in one State, may run and be executed in any other State or in any Territory, but they must be issued from, and made returnable to, the court wherein the judgment was obtained.[20] Where a marshal takes

[12] Bac. Abr. Sheriff (11).

[13] 6 Op. Atty. Gen. 466, 473.

[14] Act of June 18, 1878, § 15; 20 St. at L. 145; 1 Sup. U. S. R. S. 368.

[15] 16 Op. Atty. Gen. 162; U. S. R. S., §§ 5298, 5300.

[16] U. S. ex rel. McSweeney v. Fullhart, 47 Fed. R. 802; Sifford's Case, 5 Am. Law Reg. 659.

[17] Walker v. Lea, 47 Fed. R. 645.

[18] U. S. R. S., § 985; *infra*, § 380.

[19] Prevost v. Gorrell, 5 W. N. C. (Pa.) 151.

[20] U. S. R. S., § 986.

possession of property not subject to execution which is owned by a party to the writ, the case is one which arises under the laws of the United States, and the Federal Circuit Court has jurisdiction of a suit to recover the property.[21] So is a suit against a marshal for infringing a State statute which had been adopted by a rule of a court of the United States.[22] It has been held that, where a marshal under an execution in equity has seized the property of a person not a defendant to the writ, such third person cannot file a petition *pro interesse suo* to recover possession, but that his remedy is an original bill, or an action at law;[23] that such a suit arises under the laws of the United States, when the marshal claims that the property belongs to the defendant to the writ;[24] but that it does not when the marshal makes no such claim.[25]

§ 341. Contempts.— An attachment is the proper process to compel obedience to a decree or order requiring the performance of a specific act other than the payment of money,[1] or to punish a contempt of court.[2] It seems, that in districts held in States where imprisonment for debt has been abolished, disobedience to a decree or order for the payment of money cannot be punished by attachment;[3] unless the defaulting party is an officer of the court, as an attorney,[4] or has bid in property at a judicial sale;[5] or the motion is made by a master or the clerk of the Supreme Court to compel payment of his fees.[6] The older cases both in the English Chancery and the Federal courts hold that it is a contempt to criticise in the press the conduct of the court,[7] and to publish anything which may create a prejudice against either party to a pending cause.[8]

[21] Front St. Cable Ry. Co. v. Drake, 65 Fed. R. 539.

[22] Sowles v. Witters, 46 Fed. R. 497.

[23] Ex parte Mensing, 55 Fed. R. 17. *Contra*, St. Paul, M. & M. Ry. Co. v. Drake (C. C. A.), 72 Fed. R. 945; *supra*, § 917.

[24] Book v. Perkins, 139 U. S. 628.

[25] Buck v. Colbath, 3 Wall. 334.

§ 341. [1] Rule 8; Mallory Mfg. Co. v. Fox, 20 Fed. R. 409.

[2] U. S. R. S., § 725; Re Chiles, 22 Wall. 157.

[3] Mallory Mfg. Co. v. Fox, 20 Fed. R. 409; Nelson Morris & Co. v. Hill, 89 Fed. R. 477.

[4] Jeffries v. Laurie, 27 Fed. R. 195; Re Pitman, 1 Curtis, 186; Bagley v. Yates, 3 McLean, 465; The Laurens, 1 Abb. Adm. 508; Re Paschal, 10 Wall. 483; U. S. v. Mann, 2 Brock. 9.

[5] Camden v. Mayhew, 129 U. S. 73.

[6] Equity Rule 82; S. C. Rule 10.

[7] See the language of Lord Chancellor Hardwicke in 2 Atk. 469, 471; Hollingsworth v. Duane, Wall. C. C. 77, 100; U. S. v. Duane, Wall. C. C. 102.

[8] 2 Atk. 469.

A case in which punishment was inflicted by Judge Peck for a criticism published upon one of his decisions led to his impeachment trial before the Senate; and although he was acquitted, a statute was enacted which materially diminished the powers of the Federal courts to punish for contempt.[9] The courts of the United States have power "to punish by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided*, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other persons, to any lawful writ, process, order, rule, decree, or command of the said courts."[10] Beyond this the Circuit and District Courts have no such power.[11] The act, just quoted in terms, applies to all courts. Whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution, is doubtful.[12] It has been held at circuit that a United States commissioner has no power to punish for contempt.[13] It has been held in Ohio, under a similar statute, that the publication of charges of misconduct against a judge holding court, in a newspaper which the writer had reason to believe would be circulated and read in the court-room, and which was thus circulated and read, is "misbehavior in the presence of or so near the court or judge as to obstruct the administration of court or justice."[14] It is a contempt for a public officer

[9] U. S. R. S., § 725.

[10] U. S. R. S., § 725.

[11] Ex parte Robinson, 19 Wall. 505, 510.

[12] Field, J., in Ex parte Robinson, 19 Wall. 505, 510.

[13] In re Mason, 43 Fed. R. 510; Ex parte Doll, 7 Phila. 595; Ex parte Perkins, 29 Fed. R. 900.

[14] Myers v. State, 21 W. L. Bull. 404; s. c., 22 N. E. R. 43. See Cooper v. People, 13 Colo. 337. It has been said that a false report of a decision is, "in its essence, a common-law contempt of court." Gorham Mfg. Co. v. Emery B. T. D. E. Co., 92 Fed. R. 774, 780. It has been held that it is a contempt to represent by words and by printed circulars that a sale under an execution is invalid, and that any one who buys will become involved in litigation. In re Sowles, 41 Fed. R. 752. The writing, by a State officer, of a letter refusing a license permitting a foreign corporation to do business within the State, which states as his reason for such refusal the conduct by the applicant in certain litigation in a Federal court, is not a contempt. Hillmon v. Mutual Life Ins. Co., 79 Fed. R. 749.

to attempt to unlawfully dispossess the court, its officers or its records from rooms in which they are located.[15] The seizure by a sheriff, under State process, of property in the custody of a deputy marshal after its sale by the marshal, but before its delivery to the buyer, is a contempt of the Federal court.[16] Misbehavior in the presence of the court may consist in an assault,[17] or in abusive language addressed to the court[18] or one of its officers,[19] or any person there.[20] Similar conduct in an ante-room of the court or so near the court-room as to be heard therein is also punishable as a contempt.[21] It has been said to be a contempt for an attorney to carry a pistol into court.[22] A hearing before a master in chancery or examiner is, for this purpose, treated as a proceeding in court.[23] The cases affecting receivers have been cited in the chapter on Receivers.[24] Proceedings before a grand jury are considered to be in the presence of the court;[25] and an attempt in the hall adjoining the room where a grand jury is in session to bribe a witness summoned before it is a contempt of court.[26] Bribery of a witness in the town where the court is held has been held to be a contempt within the statute.[27] It was held to be a contempt of court to sue in a court of another State a party while there for the purpose of attending the taking of a deposition; and a fine of the expenses of such suit, including the counsel fees therein,

[15] In re Lyman, 55 Fed. R. 29.

[16] Sabin v. Fogarty, 70 Fed. R. 482. Where a marshal who had replevied goods allowed the plaintiff's agents to put them in a car and to procure a shipping receipt and bill of lading for the same, directed to a stranger to the suit, it was held that the property had passed out of the custody of the Federal court and that a sheriff who levied a State writ of attachment upon them was not guilty of contempt. Animarium Co. v. Bright, 82 Fed. R. 197.

[17] Sharon v. Hill, 24 Fed. R. 726; Ex parte Terry, 128 U. S. 289; In re Terry, 36 Fed. R. 419; U. S. v. Patterson, 26 Fed. R. 509.

[18] Ex parte Terry, 128 U. S. 289; In re Terry, 36 Fed. R. 419.

[19] Ex parte Terry, 128 U. S. 289; In re Terry, 36 Fed. R. 419.

[20] U. S. v. Emerson, 4 Cranch, C. C. 188; U. S. v. Carter, 3 Cranch, C. C. 423.

[21] U. S. v. Emerson, 4 Cranch, C. C. 188.

[22] Sharon v. Hill, 24 Fed. R. 726.

[23] Sharon v. Hill, 24 Fed. R. 726; U. S. v. Anonymous, 21 Fed. R. 761.

[24] See § 249.

[25] Savin, Petitioner, 131 U. S. 267.

[26] Ibid.

[27] In re Brule, 71 Fed. R. 943. For a case where it was held, that a man was guilty of contempt for failing to attend in obedience to a subpœna and to present to the court the facts which excused him from attendance; see Carman v. Emerson (C. C. A.), 71 Fed. R. 264.

was imposed upon the party who brought it.[28] It has been said to be a contempt of court to bring before it a collusive suit.[29]

An officer of the court may be punished by attachment for his misbehavior in office after his term of office has expired by resignation or otherwise.[30] An attorney[31] or other officer[32] of the court may be thus compelled to pay to a person named in the order money received by him in his official capacity. Where, however, there is room for a reasonable doubt as to how much is due from the officer, the court will usually refuse to proceed against him summarily, and require the complaining party to begin a suit.[33] A juror has been punished for contempt because he had talked about the case in violation of the court's direction to the contrary.[34] It is a contempt of court for a person to assist another, whether acting as the latter's agent or otherwise, in committing an act which has been forbidden to himself in an injunction issued against him individually.[35] A person not a party to the suit may be punished for a violation of an injunction against a corporation when he is a controlling member of the same and controlled part of the litigation for the defense.[36] A person not a party to the suit

[28] Bridges v. Sheldon, 7 Fed. R. 17, 45–47. But see Blight v. Fisher, Pet. C. C. 41.

[29] Lord v. Veazie, 8 How. 251; Cleveland v. Chamberlain, 1 Black, 419.

[30] The Laurens, 1 Abb. Adm. 508.

[31] In re Paschal, 10 Wall. 483; Jeffries v. Laurie, 27 Fed. R. 195.

[32] Re Pitman, 1 Curt. 186; Bagley v. Yates, 3 McLean, 465; The Laurens, 1 Abb. Adm. 508.

[33] See In re Paschall, 10 Wall. 483; U. S. v. Mann, 2 Brock. 9.

[34] Re May, 1 Fed. R. 737; U. S. v. Devaughan, 3 Cranch, C. C. 84.

[35] Dadirrian v. Gullian, 79 Fed. R. 784. A person enjoined from the infringement of a patent was held to commit a contempt by contributing to a fund to defray the expenses of another who was contesting the validity of a patent. Bate Ref. Co. v. Gillett, 30 Fed. R. 683. It has been held: that a defendant corporation which, when enjoined from selling a certain cordial in certain bottles with a particular label, sold its entire stock of cordials with such bottles and labels to a third person, under an arrangement that he would fill all orders for the cordial which the defendant should receive, was guilty of contempt; although it did not share in the profits of such sales, and although it acted under advice of counsel. Société Anonyme v. Western Distilling Co., 42 Fed. R. 96. It was held that a defendant had violated an injunction against his "making, using or vending for use" certain specified articles, where, after the injunction, he sold such an article previously manufactured. A. B. Dick Co. v. Wickelman, 89 Fed. R. 95.

[36] Stahl v. Ertel, 62 Fed. R. 920; American Const. Co. v. Jacksonville, T. & K. Ry. Co., 52 Fed. R. 937.

who assists a party in violating an injunction may be punished for a contempt.[37] A person is not relieved from punishment for contempt because he acted in good faith under the advice of counsel that he was not infringing the court's order;[38] but such advice may be considered in mitigation of the damages.[39] And if the question as to whether he is in contempt is doubtful, the court will not punish him.[40] A violation of an order may be punished when it was the result of negligence, but not wilful disobedience.[41]

A court has no jurisdiction to punish for contempt an act not forbidden at the time of its commission; nor can it accomplish such a result by the entry of an order *nunc pro tunc* as of a date prior to the commission of the act,[42] except in a case where the judge has announced orally from the bench a decision that an injunction issue, when the order may be entered as of the date of such decision, and a subsequent act may be punished accordingly, even if committed before the formal entry of the order.[43] It has been held that a court has no jurisdiction to punish as a contempt a violation of an oral stipulation made in open court.[44] A domestic or foreign corporation, as well as an individual, may be fined for a contempt.[45] A recent statute allows any Circuit Court or judge of the United States to punish as for a contempt or otherwise the violation of an injunction granted by any Circuit Court of the United States or judge thereof restraining and enjoining the performance or representation of a dramatic or musical composition.[46] Disobedience to a subpœna issued by a Circuit Court of one district ordering a witness to appear and testify before a master appointed to take testimony therein by the Circuit Court

[37] Ex parte Lennon, 64 Fed. R. 820; s. c., 166 U. S. 548.

[38] Atlantic G. P. Co. v. Dittman P. Mfg. Co., 9 Fed. R. 316; Ulman v. Ritter, 72 Fed. R. 1000.

[39] Ulman v. Ritter, 72 Fed. R. 1000

[40] California P. Co. v. Molitor, 113 U. S. 609; Onderdonk v. Fanning, 2 Fed. R. 568; Lilienthal v. Wallach, 37 Fed. R. 241; Truax v. Detweiler, 46 Fed. R. 117.

[41] Indianapolis Water Co. v. American Strawboard Co., 75 Fed. R. 972.

[42] Ex parte Buskirk (C. C. A.), 72 Fed. R. 14.

[43] Ibid.; Kimpton v. Eve, 2 Ves. & B. 349; Anon., 3 Atk. 567; James v. Downs, 18 Ves. 522; Vansandan v. Rose, 2 Jac. & W. 264; Koehler v. Farmers' & D. Nat. Bank, 6 N. Y. Supp. 470.

[44] Ex parte Buskirk (C. C. A.), 73 Fed. R. 14, 20.

[45] U. S. v. Memphis & L. R. R. Co., 6 Fed. R. 237.

[46] 29 St. at L. 482.

of another district is punishable by the court which issued the subpœna.[47]

§ 342. Notice of application for attachment.— The rules provide that if a decree be for the performance of a specific act, other than the payment of money, it must prescribe the time within which the act shall be done, "of which the defendant shall be bound without further service to take notice;"[1] and that, "except in cases where personal or other notice is specially required or directed," an entry of an order in the order-book is sufficient notice thereof to the parties to the suit.[2] A party who has actual knowledge of the issue of an injunction may be punished for disobedience to the same, although he has not been served with a copy of the writ or order.[3] It is, however, the safer practice to make personal service of a certified copy of a decree or order, disobedience to which it is desired to punish by an attachment.[4] In case of disobedience to a decree for the performance of a specific act, other than the payment of money, the rules direct the issue of an attachment *ex parte* by the clerk, upon the filing of an affidavit that the act has not been performed within the required time.[5] It is, however, the usual practice to give notice to the delinquent, of an application for an attachment, either by an order to show cause or otherwise.[6] An attachment may be issued at the request of a person not a party to the cause in whose favor an order has been made, or against a person not a party to the cause against whom obedience to an order can be enforced.[7] Notice of the application, when required, should be served personally upon

[47] In re Spofford, 62 Fed. R. 448.

§ 342. [1] Equity Rule 8.

[2] Equity Rule 4.

[3] Ex parte Lennon, 64 Fed. R. 320; s. c., 166 U. S. 548.

[4] In re Cary, 10 Fed. R. 622; In re Lloyd, 10 Beav. 451. But see Re Feeny, 1 Hask. 304; s. c., 4 N. B. R. [70] 233; Skip v. Harwood, 3 Atk. 564; Hearn v. Tenant, 14 Ves. 136; People v. Brower, 4 Paige (N. Y.), 405.

[5] Rule 8.

[6] Worcester v. Truman, 1 McLean, 483; Fischer v. Hayes, 6 Fed. R. 63. Six days' notice has been held to be reasonable. American Const. Co. v. Jacksonville, T. & K. Ry. Co., 52 Fed. R. 937. In the Southern District of New York the rules provide for four days' notice. Where the notice named a defendant corporation "and its officers" as the objects of the contempt proceedings, without specifying the individual officers, it was held that any officer served with the notice might be attached. American Const. Co. v. Jacksonville, T. & K. Ry. Co., 52 Fed. R. 937.

[7] Equity Rule 10. See King v. McLean Asylum of M. G. Hospital (C. C. A.), 64 Fed. R. 325.

the person thereby affected.[8] If a party conceals himself to avoid personal service of the notice, perhaps notice may be served upon an attorney who has appeared for him in the proceeding in which the contempt was committed.[9]

§ 343. Hearing upon applications for attachments.— When the contempt was committed in the presence of the court, no notice nor trial of any disputed question of fact is necessary.[1] It has been held at circuit that in any other case, at least when an attachment has been issued, a person charged with contempt may demand that interrogatories be filed concerning the facts which, it is claimed, constitute his offense; and that, if he denies the facts charged under oath, he cannot be punished,—the only remedy being an indictment against him for perjury:[2] but a recent decision of the Supreme Court seems contrary to these rulings;[3] and it seems that this never was the rule in equity.[4] He cannot be compelled to answer interrogatories.[5] Otherwise, when at the argument of the motion for an attachment the party accused of disobedience denies the charge, the court may either determine the disputed question of fact upon such affidavits as are then presented to it, or refer the question to a master.[6] If it finds the charge proved, or the master so report and his report be confirmed, the court may then punish the offender by fine or imprisonment, and, if a fine be imposed, may direct him "to stand committed till paid."[7] The court cannot punish a contempt by striking out an answer or by refusing a hearing upon the merits.[8] The court may make a preliminary order directing that

[8] Gray v. Chicago, I. & N. R. Co., 1 Woolw. 63; Hollingsworth v. Duane, Wall. C. C. 141.

[9] Eureka L. & Y. C. Co. v. Superior Ct. of Yuba County, 116 U. S. 410, 418.

§ 343. [1] Ex parte Terry, 128 U. S. 289; In re Terry, 36 Fed. R. 419.

[2] U. S. v. Dodge, 2 Gall. 313; Hollingsworth v. Duane, Wall. C. C. 77. See U. S. v. Duane, Wall. C. C. 103.

[3] Savin, Petitioner, 131 U. S. 267.

[4] U. S. v. Anon., 11 Fed. R. 761. See U. S. v. Debs, 64 Fed. R. 724.

[5] Hollingsworth v. Duane, Wall. C. C. 77. See U. S. v. Duane, Wall. C. C. 102.

[6] Fischer v. Hayes, 6 Fed. R. 63; U. S. v. Debs, 64 Fed. R. 724. See Woodruff v. North Bl. G. M. Co., 45 Fed. R. 129. In the absence of a denial, machines or articles sold under the same name as those the sale of which was enjoined will be presumed to be of the same character. Stahl v. Ertel, 62 Fed. R. 920; Stebbins v. Duncan, 108 U. S. 32, 48; Brown v. Metz, 33 Ill. 339.

[7] Fischer v. Hayes, 6 Fed. R. 63; U. S. R. S., § 725.

[8] Hovey v. Elliott, 167 U. S. 409.

he be fined; determining the principles with regard to which the amount of the fine should be estimated; and directing either the submission of the amount to the court upon affidavits, or a reference to a master for that purpose.[9] When an injunction against the infringement of a patent has been violated, the fine may include the profits made by the defendant by his contemptuous acts; and in that case the order may direct that that part of the fine be paid to the complainant.[10] When the contempt consisted in the institution of a suit, the fine should include the expenses of the defense of such suit including reasonable counsel fees, which must be paid to the party against whom the contemptuous suit was brought.[11] A reasonable counsel fee for the contempt proceedings is usually included in the fine.[12] In these cases the writ of attachment does not issue till after the final order. "In proceedings in equity between parties to a suit for contempt in not obeying the process of the court, or any order or decree in the cause, the proceedings in equity between parties to a suit for contempt in not obeying the process of the court, or any order or decree in the cause, the proceedings on the attachment may be, and usually are, entitled as in the original suit, though it is not irregular to entitle them in the name of *The People*, on the relation of the person prosecuting the attachment against the defendant or party proceeded against. Where the attachment proceeding for a contempt is against a witness, or a person not a party to the suit, the practice is to entitle the order for attachment, and all subsequent proceedings thereon, in the name of *The People*, on the relation, etc." [13] On a motion for a commitment for contempt when served with a subpœna, it was held that two witnesses must be produced to prove contemptuous words, but that one was sufficient to prove a battery upon the process-server.[14] A State statute regulating the prac-

[9] Fischer v. Hayes, 6 Fed. R. 63.

[10] Searles v. Worden, 13 Fed. R. 716; s. c. as Worden v. Searles, 121 U. S. 14; In re Mullee, 7 Blatchf. 23; Doubleday v. Sherman, 8 Blatchf. 45.

[11] Bridges v. Sheldon, 7 Fed. R. 747.

[12] Stahl v. Ertel, 62 Fed. R. 920.

[13] Blatchford, J., in Fischer v. Hayes, 6 Fed. R. 63. See also People v. Craft, 7 Paige (N. Y.), 235; Stafford v. Brown, 4 Paige (N. Y.), 360; U. S. ex rel. Southern Exp. Co. v. Memphis & L. R. Co., 6 Fed. R. 237. But see U. S. v. Wayne, Wall. C. C. 134.

[14] Anon., 3 Atkyns, 219. As to sufficiency of proof, see U. S. v. Jose, 63 Fed. R. 951.

tice in contempt proceedings does not affect the practice in the Federal courts.[15] But criminal proceedings to punish contempts are, to a certain extent, by statute assimilated like other criminal proceedings to the State practice.[16] It has been said that proceedings to punish for contempt of court are of a criminal rather than a civil nature;[17] but that the offense is not a felony, but more in the nature of a misdemeanor.[18]

§ 344. Order of commitment.— It is better practice for the order committing a person for contempt to recite the offense charged, although it seems that this is not necessary if it describes the same by reference to other proceedings.[1] It has been said that an order committing a person for contempt cannot be altered at a subsequent term of the court;[2] that the court cannot subsequently discharge the party committed upon proof of his inability to comply with the order, his remedy being an application to the President for a pardon;[3] and that such an order is void if it does not express or limit the term of imprisonment.[4] Before the Evarts Act no appeal lay from an order committing a person for contempt.[5] If such an order is void, the prisoner may be discharged on *habeas corpus*,[6] but not for irregularities,[7] nor for the erroneous construction of a statute,[8] when the court had jurisdiction to grant the order.

[15] Searles v. Worden, 13 Fed. R. 716.

[16] In re Riker, 66 Fed. R. 290.

[17] Ex parte Kearney, 7 Wheat. 38; In re Pitman, 1 Curtis, 186; Fischer v. Hayes, 6 Fed. R. 63; Hayes v. Fischer, 103 U. S. 121; New Orleans v. Steamship Co., 20 Wall. 387; Re Manning, 44 Fed. R. 275.

[18] In re Acker, 66 Fed. R. 290.

§ 344. [1] Fischer v. Hayes, 6 Fed. R. 63.

[2] Fischer v. Hayes, 6 Fed. R. 63.

[3] Re Mullee, 7 Blatchf. 23.

[4] Matter of Marsh, MacA. & M. (D. C.) 32.

[5] Hayes v. Fischer, 102 U. S. 121. It was held by the Circuit Court of Appeals for the Second Circuit that under the Evarts Act such an order could be reviewed by writ of error (Gould v. Sessions, 67 Fed. R. 163; Butler v. Fayerweather, 91 Fed. R. 458); but not by appeal (Sessions v. Gould, 63 Fed. R. 1001). It has since been held by the same court that such an order cannot be reviewed by writ of error. Nassau El. R. Co. v. Sprague El. N. Y. & M. Co., 95 Fed. R. 415, which follows In re Debs, 158 U. S. 564, 573. See, however, In re Spofford, 62 Fed. R. 443. The Supreme Court has refused to review by writ of error the judgments of a State court denying an application to punish a party for contempt, where it was claimed that the obligation of a contract was impaired by such denial. Newport Light Co. v. Newport, 151 U. S. 527.

[6] Ex parte Fisk, 113 U. S. 713; Ex parte Terry, 128 U. S. 289. See §§ 366, 367, *infra*.

[7] Savin, Petitioner, 131 U. S. 267, 279; Stevens v. Fuller, 136 U. S. 468, 478. See §§ 366, 367, *infra*.

[8] In re Tyler, 149 U. S. 164; In re

Upon an appeal from the final decree so much of an order fining a party for contempt as gave indemnity to his antagonist may be reviewed,[9] but not so much of the fine as was imposed solely by way of punishment to vindicate the dignity of the court.[10] A prisoner committed for a contempt is not entitled to any credit for good behavior.[11]

§ 345. Writ of attachment.— An attachment is a writ directed to the marshal of the court, sealed and bearing *teste* in the same manner as a writ of subpœna,[1] directing him to attach the body of the person named therein, and to safely keep the same, so that he can produce the person or persons thus attached in court at a certain day termed the return day of the writ, or until the further order of the court.[2] The writ must be indorsed with the special reason for which it is issued, and also with the name and address of the solicitor of the party issuing it.[3] The writ may be issued either in vacation or in term; and may be returnable immediately; provided, at least, that the party against whom it is issued then dwells or is within twenty miles of the place of holding the court. Otherwise, a period of fifteen days between the *teste* and the return might be required.[4]

§ 346. Execution of writ of attachment.— The first thing to be done after the writ has been issued is to deliver it to the marshal to whom it is directed, or to one of his deputies authorized by him to receive such writs.[1] Although the writ is always directed to the marshal of the judicial district within which it is to be executed,[2] it is usually executed by one of his deputies. The marshal and his deputy can only execute the writ within the district for which he has been appointed;[3] and not then against a person who has been brought there by force or fraud, or under such circumstances as would make it improper to serve a subpœna upon him;[4] and probably not upon

Lennon, 150 U. S. 393; In re Swan, 150 U. S. 637; *infra*, § 366.

[9] Worden v. Searls, 121 U. S. 14, 26.

[10] New Orleans v. Steamship Co., 20 Wall. 387.

[11] In re Terry, 37 Fed. R. 649.

§ 345. [1] See U. S. R. S., § 911.

[2] Braithwaite's Pr. 159–161.

[3] Braithwaite's Pr. 159.

[4] Acts of 11 Geo. IV. and 1 Wm. IV., ch. 36, § 15, note 8.

§ 346. [1] U. S. R. S., § 787.

[2] U. S. R. S., § 787.

[3] U. S. R. S., § 787; In the Matter of Allen, 13 Blatchf. 271; Voss v. Luke, 1 Cranch, C. C. 331; Sommerville v. French, 1 Cranch, C. C. 474.

[4] In the Matter of Allen, 13 Blatchf.

Sunday,[5] nor usually in the court-room.[6] If a writ is to be executed in a different district from that within which the court issuing it is situated, it should be directed to the marshal of that district.[7] This has been held proper, when the writ issues to attach, for disobedience to a subpœna, a witness who lives within a hundred miles of the place of holding the court.[8] It has been held that in other cases this cannot be done;[9] but that, on presentation of a certified copy of the contempt proceedings and of the writ of attachment, the district attorney of the district where the delinquent is, may obtain from a commissioner of that district a warrant for the arrest of the party in contempt, who is then entitled to an examination, pending which he may be discharged on bail; and that if the commissioner decides to hold the party in contempt, the judge of that district may issue a warrant for his removal as in other criminal cases.[10] If the delinquent be already in custody, either upon criminal sentence or civil process, no further arrest is necessary; but the marshal should give notice of the attachment, which notice is called a detainer, to the keeper or jailer in whose custody he is.[11] If a return day be appointed in a writ, and it be issued to enforce obedience to an interlocutory order, the marshal may, but is not obliged to, allow the delinquent to go at large with or without security for his surrender to him upon the return day.[12] If the delinquent do not then surrender himself to the marshal's custody, the latter and his bondsmen are responsible for all damages which the court shall determine have resulted therefrom to the party at whose instance the writ was issued.[13] It seems, however, that this cannot be done when the writ is issued for a refusal to perform a specific act in obedi-

271. And see authorities cited under §§ 98, 277. *Cf.* Wroe v. Clayton, 16 Simons, 183.

[5] 29 Car. II, ch. 12, § 6. And see authorities cited under § 84.

[6] U. S. v. Scholfield, 1 Cranch, C. C. 130; Davis v. Sherron, 1 Cranch, C. C. 287.

[7] Voss v. Luke, 1 Cranch, C. C. 331; Sommerville v. French, 1 Cranch, C. C. 474.

[8] Voss v. Luke, 1 Cranch, C. C. 331. But see Henry v. Ricketts, 1 Cranch, C. C. 580.

[9] Ex parte Graham, 3 Wash. C. C. 456, 462; Re Manning, 44 Fed. R. 275.

[10] U. S. v. Jacobi, 4 Am. L. T. R. 148, 151, 152; Re Manning, 44 Fed. R. 275.

[11] Trotter v. Trotter, Jacob, 533.

[12] Morris v. Hayward, 6 Taunt. 569; Studd v. Acton, 1 H. Blk. 468.

[13] Moore v. Moore, 25 Beav. 8; U. S. R. S., §§ 783–786.

ence to a decree.[14] According to an old writer, it seems that when the marshal "has taken up the body he has paid obedience to the writ, though he does not actually bring him up to the court; because the contempt only induces a commitment, which is satisfied by imprisonment in the county gaol."[15] If, however, he be specially ordered so to do, he must obey. Upon the return day of the writ the marshal should make a return thereto. He cannot detain the party named in the writ after the return day, unless by the court's order.[16] There are three ordinary returns upon a writ of attachment: *First*, if the delinquent cannot be arrested, the marshal returns, "The within-named John Stiles is not found in my bailiwick," — this is termed a *non est inventus*, and upon it further process of contempt is grounded; *second*, if the delinquent has been arrested, but the marshal has either accepted bail for his appearance or keeps him in his own custody, the return is, "I have attached the within named John Stiles, as within I am commanded, whose body I have ready," — this is called *accepi corpus; third*, if the marshal has arrested the delinquent and lodged him in jail, or, finding him there, has lodged a detainer against him, the marshal returns, "I have attached the within-named John Stiles, whose body remains in [naming the jail or prison] in my custody."[17] Although the return is regularly made by the marshal, no matter by whom the writ has been executed, it will not be void if made by his deputy.[18] If the marshal refuse to make any return he may be compelled to do so, by means of an order to show cause followed by an attachment against him.[19] When the marshal or his deputy is a party to a cause, or probably when a writ of attachment is issued against either of them, the writs and precepts therein must be directed to such disinterested person as the court or any justice or judge thereof may appoint, and the person so appointed may execute and return them.[20] In such a case the person serving the process should make affidavit thereof.[21] A person arrested in

[14] Rule 9; Cowdry v. Cross, 24 Beav. 445.

[15] Gilbert's Ch. 88.

[16] Ex parte Burford, 1 Cranch, C. C. 456.

[17] Braithwaite's Pr. 272, 281.

[18] Spafford v. Goodell, 3 McLean, 97.

[19] U. S. v. Scroggins, 3 Woods, 529; Daniell's Ch. Pr. 470.

[20] U. S. R. S., § 923; Rule 15.

[21] Rule 15.

criminal proceedings to punish for a contempt is entitled to an examination before a magistrate if so entitled by the State practice.[22]

§ 347. Sequestration.— The process of sequestration is a writ or commission issuing under the seal of the court, directed either to the marshal or to certain persons of the plaintiff's nomination, empowering him or them to enter upon and sequester the real and personal estate of a defendant (or some particular parcel of his lands), and to take, receive, and sequester the rents, issues, and profits thereof, and keep the same in their hands, or pay the same in such manner and to such persons as the court shall in its discretion appoint, until such defendant shall have performed some matter, previously ordered by the court, in the process specifically mentioned, for not doing whereof he is in contempt.[1] This is one of the oldest writs of the court of chancery, and has been the cause of many conflicts between the English chancellors and the courts of common law.[2] Much curious history and learning upon the subject invite the attention of the antiquarian; but, as the writ is now rarely used, little space will be devoted to it in this work. By the Equity Rules, whenever the marshal has returned *non est inventus* under a writ of attachment, a writ of sequestration may issue to compel obedience to a decree or order of the court.[3] The writ, when not issued to the marshal, appoints two or more sequestrators.[4] The usual number is four.[5] The sequestrators are officers of the court, and as such are subject to new directions during their discharge of their functions,[6] may be attached for disobedience or misconduct,[7] and, if resistance be made to them, may be aided by the court with the exercise of its process of contempt,[8] or by a writ of assistance. Sequestrators must from time to time account

[22] In re Acker, 66 Fed. R. 290.

§ 347. [1] Hinde's Ch. Pr. 127; Hoffman's Ch. Pr., ch. iii, § 10; Daniell's Ch. Pr., ch. xxv, § 7.

[2] Gilbert's Forum Romanum, 78; Daniell's Ch. Pr., ch. xxv, § 7.

[3] Rules 7 and 8. See Shainwald v. Lewis, 6 Fed. R. 766, 777.

[4] Hoffman's Ch. Pr., ch. iii, § 10; Daniell's Ch. Pr., ch. xxv, § 5.

[5] Daniell's Ch. Pr., ch. xxv, § 5.

[6] Hinde's Ch. Pr. 138; Daniell's Ch. Pr., ch. xxv, § 7; Hoffman's Ch. Pr., ch. iii, § 10.

[7] Lord Pelham v. Lord Harley, 3 Swanst. 291, n.

[8] Angel v. Smith, 9 Ves. 336; Lord Pelham v. Duchess of Newcastle, 3 Swanst. 293, n.; Rule 9.

[9] Lord Pelham v. Duchess of Newcastle, 3 Swanst. 289, n.; Rule 9.

for what comes into their hands, and pay into court such money as they receive.[10]

§ 348. Writ of assistance.— The Equity Rules provide that "when any decree or order is for the delivery of possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court."[1] This is a writ commanding the marshal to eject the defendant from the land and put the plaintiff in possession; and is executed in the same manner as a writ of *habere facias possessionem* is executed in favor of a successful plaintiff in the action of ejectment;[2] "in the execution of which the sheriff may take with him the *posse comitatus*, or power of the county, and may justify breaking open doors, if the possession be not quietly delivered. But, if it be peaceably yielded up, the delivery of a twig, a turf, or the ring of a door in the name of seisin, is sufficient execution of the writ."[3] This writ is often used to put into possession receivers[4] and sequestrators.[5] It is not issued without an order for that purpose.[6] It cannot issue against any but a party to the suit, or his representative, or one who came into possession under him since the suit was begun.[7] The grantee of the purchaser at a foreclosure sale where the court has ordered the receiver to put him in possession of the purchased property, and where the court has retained jurisdiction of the suit, may obtain a writ of possession.[8] The writ cannot be issued to put a party in possession of land beyond the territorial jurisdiction of the court, and all acts of the marshal beyond such jurisdiction are unauthorized notwithstanding the command of the writ.[9]

[10] Howell v. Lord Coningsby, 1 Fowl. Ex. Pr. 161; Deshrow v. Crommie, Bunb. 272.

§ 348. [1] Rule 9.

[2] Hunter's Suit in Equity (6th ed.), 168.

[3] Bl. Com. 412.

[4] Sharp v. Carter, 3 P. Wms. 375, 379, n.; Seton on Decrees (4th ed.), 441, 1563.

[5] Lord Pelham v. Duchess of Newcastle, 3 Swanst. 289, n.; Seton on Decrees (4th ed.), 1562.

[6] Seton on Decrees (4th ed.), 1562.

[7] Terrell v. Allison, 21 Wall. 289; Howard v. Railway Co., 101 U. S. 837, 849; Thompson v. Smith, 1 Dill. 458.

[8] Farmers' L. & Tr. Co. v. Chicago & A. Ry. Co., 44 Fed. R. 658, 658. But see Van Hook v. Throckmorton, 3 Paige (N. Y.), 33; People v. Grant, 45 Cal. 97; Stanley v. Sullivan, 71 Wis. 585.

[9] In re Anderson, 94 Fed. R. 487, 497.

§ 349. Action by court itself.— In the year 1830, an act was passed in England, at the instance of Sir Edward Sugden, the author of Sugden on Powers, afterwards Lord St. Leonards, providing: "That when any person shall have been directed by any decree or order to execute any deed or other instrument, or make a surrender or transfer, or to levy a fine or suffer a recovery, and shall have refused or neglected to execute, make or transfer, or levy or suffer the same, and shall have been committed to prison under process for such contempt, or, being confined in prison for any other cause, shall have been charged with or detained under process for such contempt, and shall remain in such prison, the court may, upon motion or petition, and upon affidavit that such person has after the expiration of two calendar months from the time of his being committed under or charged with, or detained under such process, again refused to execute such deed or instrument or make such surrender or transfer, or levy or suffer such fine or recovery, order or appoint one of the masters in ordinary, or if the act is to be done out of London, then, if necessary, one of the masters extraordinary, to execute such deed or other instrument or to make such surrender or transfer, for and in the name of such person, and to levy such fine or suffer such recovery, in his name, and to do all acts necessary to give validity and operation to such fine and recovery, and to lead or declare the uses thereof: and the execution of the said deed or other instrument, and the surrender or transfer made by the said master, and the fine or recovery levied or suffered by him, shall in all respects have the same force and validity as if the same had been executed or made, levied or suffered, by the party himself; and within ten days after the execution or making of any such deed or other instrument or surrender or transfer, or levying or suffering such fine or recovery, notice thereof shall be given by the adverse solicitor to the party in whose name the same is executed or made; and such party, as soon as the deed or other instrument or surrender, transfer, fine or recovery shall be executed, made, levied, or suffered, shall be considered as having cleared his contempt, except as far as regards the payment of the costs of the contempt, and shall be entitled to be discharged therefrom, under any of the provisions of this act applicable to his case; and the court shall

make such order as shall be just, touching the payment of the costs of or attending any such deed, surrender, instrument, transfer, fine, or recovery."[1] "That where a person shall be committed for a contempt in not delivering to any person or persons or depositing in court or elsewhere, as by any order may be directed, books, papers, or any other articles or things, any sequestrator or sequestrators appointed under any commission of sequestration shall have the same power to seize and take such books, papers, writings, or other articles or things, being in the custody or power of the person against whom the sequestration issues, as they would over his own property; and thereupon such articles or things so seized and taken shall be dealt with by the court as shall be just; and after such seizure it shall be lawful for the court, upon the application of the prisoner, or of any other person in the cause or matter, or upon any report to be made in pursuance of this act, to make such order for the discharge of the prisoner, upon such terms, and, if it shall see fit, making any costs to the cause, as to the court shall seem proper."[2] How far these acts will be followed by the Federal courts is a matter for future decision.[3] The Supreme Court of the District of Columbia has power to appoint a trustee to execute an assignment of a patent-right, if the defendant refuses to do so after a sale of the patent-right under a creditor's bill, and the decree for the sale may contain a provision for the appointment of the trustee in case of such refusal together with a direction that the defendant execute the assignment.[4] A Circuit Court of the United States has power to direct its marshal to remove buildings from land over which a complainant has a right of way.[5]

§ 349a. Bills to carry decrees into execution.— A bill to carry a decree into execution is proper where, after a decree has been pronounced, it has happened that owing to some neglect of the parties to proceed upon the decree, their rights have become so embarrassed by subsequent events that no ordinary

§ 349. [1] Acts of 1 Wm. IV., ch. 36, § 15, R. 15, passed in 1830.

[2] Act of 1 Wm. IV., ch. 36, § 15, R. 16.

[3] See Rule 90; Shepherd v. Com'rs of Ross County, 7 Ohio, 271; Carpenter v. Strange, 141 U. S. 787; Sayle v. Scott Paper Mfg. Co., 55 Fed. R. 553, 557; Lynde v. Columbus, C. & I. C. Ry. Co., 57 Fed. R. 993; Wilson v. Martin, etc. Co., 151 Mass. 515; *supra*, §§ 8, 98, 325.

[4] Ager v. Murray, 105 U. S. 126, 132.

[5] Gormley v. Clark, 134 U. S. 338.

process of the court upon the first decree will serve, and it is therefore necessary to have another decree of the court to ascertain and enforce them;[1] or where a person who was not a party nor claims under a party to the original decree, claims, in a similar interest, or is unable to obtain the determination of his own right until the decree has been carried into execution;[2] or by or against a person claiming as assignee of a party to the original decree,[3] or otherwise, in privity with such a party, for example, a stockholder or perhaps creditor of a corporation;[4] or to carry into execution the judgment of an inferior court of equity.[5] A bill of this description is generally partly an original bill, though not strictly original; and sometimes it is likewise a bill of revivor or a supplemental bill, or both: and the frame of the bill, and the course of proceedings upon it, vary accordingly.[6] Such a bill is treated as ancillary to the principal suit, and the Federal court in which the original decree was entered will take jurisdiction of the same irrespective of the citizenship of the parties.[7] Upon a bill to carry a decree into execution the court is at liberty to examine into the grounds of the original decree, and if such decree appears to have been erroneous, to refuse to enforce it, even when the original decree was entered by consent.[8] Where a decree is capable of being executed by the ordinary process and forms of the court, whatever the iniquity of the decree may be, till it is reversed the court is bound to assist it with the utmost

§ 349a. [1] Mitford's Pl., ch. i, § 3; Daniell's Ch. Pr. (1st Am. ed.) 1689; Johnson v. Northley, Prec. in Ch. 134; s. c., 2 Vern. 407.

[2] Mitford's Pl., ch. i, § 3; Daniell's Ch. Pr. (1st Am. ed.) 1689, 1690; Rylands v. Latouche, 2 Bligh, 566; Oldham v. Eboral, Cooper Sel. Cases, *temp.* Brougham, 27.

[3] Lawrence Mfg. Co. v. Janesville C. Mills, 138 U. S. 552; Organ v. Gardiner, 1 Ch. Cas. 231; Lord Carteret v. Paschal, 3 Peere Wms. 197; Binks v. Binks, 2 Bligh. P. C. 593; Root v. Woolworth, 150 U. S. 401; Daniell's Ch. Pr. (1st Am. ed.) 1691.

[4] Central Tr. Co. v. Western N. C. R. Co., 89 Fed. R. 24.

[5] Morgan v. ——, 1 Atk. 408; Mitford's Pl., ch. i, § 3; Daniell's Ch. Pr. (1st Am. ed.) 1691.

[6] Mitford's Pl., ch. i, § 3; Daniell's Ch. Pr. (1st Am. ed.) 1693.

[7] Railroad Co. v. Chamberlain, 6 Wall. 748; Root v. Woolworth, 150 U. S. 401; Central Tr. Co. v. Western R. Co., 89 Fed. R. 24.

[8] Lawrence Mfg. Co. v. Janesville C. Mills, 138 U. S. 552, 562; Gay v. Parprat, 106 U. S. 679; Lawrence v. Berney, 2 Rep. in Ch. 127; Johnson v. Northey, Prec. in Ch. 134; s. c., 2 Vern. 407; Atty. Gen. v. Day, 1 Vesey, 218; Wert v. Skip, 1 Vesey, 218; Hamilton v. Houghton, 2 Bligh, P. C. 169; Mitford's Pl., ch. i, § 3; Daniell's Ch. Pr. (1st Am. ed.) 1691, 1692.

process of the court upon the first decree will serve, and it is therefore necessary to have another decree of the court to ascertain and enforce them;[1] or where a person who was not a party nor claims under a party to the original decree, claims, in a similar interest, or is unable to obtain the determination of his own right until the decree has been carried into execution;[2] or by or against a person claiming as assignee of a party to the original decree,[3] or otherwise, in privity with such a party, for example, a stockholder or perhaps creditor of a corporation;[4] or to carry into execution the judgment of an inferior court of equity.[5] A bill of this description is generally partly an original bill, though not strictly original; and sometimes it is likewise a bill of revivor or a supplemental bill, or both; and the frame of the bill, and the course of proceedings upon it, vary accordingly.[6] Such a bill is treated as ancillary to the principal suit, and the Federal court in which the original decree was entered will take jurisdiction of the same irrespective of the citizenship of the parties.[7] Upon a bill to carry a decree into execution the court is at liberty to examine into the grounds of the original decree, and if such decree appears to have been erroneous, to refuse to enforce it, even when the original decree was entered by consent.[8] Where a decree is capable of being executed by the ordinary process and forms of the court, whatever the iniquity of the decree may be, till it is reversed the court is bound to assist it with the utmost

§ 349a. [1] Mitford's Pl., ch. i, § 3; Daniell's Ch. Pr. (1st Am. ed.) 1689; Johnson v. Northley, Prec. in Ch. 184; s. c., 2 Vern. 407.

[2] Mitford's Pl., ch. i, § 3; Daniell's Ch. Pr. (1st Am. ed.) 1689, 1690; Rylands v. Latouche, 2 Bligh, 566; Oldham v. Eboral, Cooper Sel. Cases, *temp.* Brougham, 27.

[3] Lawrence Mfg. Co. v. Janesville C. Mills, 138 U. S. 552; Organ v. Gardiner, 1 Ch. Cas. 231; Lord Carteret v. Paschal, 3 Peere Wms. 197; Binks v. Binks, 2 Bligh. P. C. 593; Root v. Woolworth, 150 U. S. 401; Daniell's Ch. Pr. (1st Am. ed.) 1691.

[4] Central Tr. Co. v. Western N. C. R. Co., 89 Fed. R. 24.

[5] Morgan v. ——, 1 Atk. 408; Mitford's Pl., ch. i, § 3; Daniell's Ch. Pr. (1st Am. ed.) 1691.

[6] Mitford's Pl., ch. i, § 3; Daniell's Ch. Pr. (1st Am. ed.) 1693.

[7] Railroad Co. v. Chamberlain, 6 Wall. 748; Root v. Woolworth, 150 U. S. 401; Central Tr. Co. v. Western R. Co., 89 Fed. R. 24.

[8] Lawrence Mfg. Co. v. Janesville C. Mills, 138 U. S. 552, 562; Gay v. Parprat, 106 U. S. 679; Lawrence v. Berney, 2 Rep. in Ch. 127; Johnson v. Northey, Prec. in Ch. 134; s. c., 2 Vern. 407; Atty. Gen. v. Day, 1 Vesey, 218; Wert v. Skip, 1 Vesey, 218; Hamilton v. Houghton, 2 Bligh, P. C. 169; Mitford's Pl., ch. i, § 3; Daniell's Ch. Pr. (1st Am. ed.) 1691, 1692.

process the course of the court will bear; but where the common process of the court will not serve and things come to be in such a state and condition after a decree made, that it requires a new bill and a second decree upon that before the first decree can be executed, if the first decree is unjust, the court desires to be excused in making it its own, and to build upon such foundations, and charging its conscience with promoting an apparent injustice; and this obliges the court to examine the grounds of the first decree before it makes the same decree again.[9] Equitable assets held by the defendant to a decree in which no strangers to the suit claim any interest can be subjected to the payment of sums awarded by the decree through a petition in the original cause.[10] An original bill for that purpose is irregular; but it may be sustained as such a petition; when no subpœna need be served, an ordinary notice being sufficient.[11]

[9] Lawrence v. Berney, 2 Ch. R. 127; Lawrence Mfg. Co. v. Janesville C. Mills, 188 U. S. 552, 562; Mitford's Pl., ch. i, § 8; Daniell's Ch. Pr. (1st Am. ed.) 1691, 1692.

[10] Maitland v. Gibson, 79 Fed. R. 136.

[11] Ibid.

CHAPTER XXVII.

CORRECTION OF DECREES OTHERWISE THAN BY APPEAL.

§ 350. Correction of decrees in general.— When a party to a suit in equity, or his representative, feels himself aggrieved by a final decree of the court, there are eight ways in which he can apply to have such decree reversed, set aside, or varied: by petition for a mere clerical or accidental error,[1] by a petition for a rehearing,[2] by a bill of review,[3] by a bill in the nature of a bill of review,[4] by a supplemental bill in the nature of a bill of review,[5] by a bill to set aside a decree on account of fraud, mistake, accident, or surprise,[6] by a bill to suspend or avoid the operation of a decree,[7] and by an appeal.[8] An interlocutory decree can be corrected at the entry of the final decree.[9] A rule of the State court permitting decrees or a default to be opened at the term after they have become absolute will not be followed by the Federal courts.[10]

§ 351. Amendment of decrees without a rehearing.— The rules provide that "clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may, at any time before an actual enrolment thereof, be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a rehearing."[1] Decretal orders may be corrected in the same manner.[2] In this way, corrections have been permitted of errors in the title of a decree or order;[3] of an omission in a decree for specific performance of

§ 350. [1] § 351.
[2] § 352.
[3] §§ 354–356.
[4] § 357.
[5] § 358.
[6] § 358.
[7] § 359.
[8] Ch. XXX.
[9] Henry v. Travelers' Ins. Co., 34 Fed. R. 258; Clark v. Blair, 14 Fed. R. 812; Coburn v. Schroeder, 8 Fed. R. 521; Iowa v. Illinois, 151 U. S. 238; *supra*, § 318. See, however, Gunn v. Black, 60 Fed. R. 151. See Comly v. Buchanan, 81 Fed. R. 58. For motions at the foot of a decree, see *supra*, § 325*a*.
[10] Austin v. Riley, 55 Fed. R. 833.

§ 351. [1] Rule 85. See Witters v. Sowles, 32 Fed. R. 130; Hop B. Mfg. Co. v. Warner, 28 Fed. R. 577.
[2] Union S. Ref. v. Mathiesson, 3 Cliff. 146.
[3] Spearing v. Lynn, 2 Vern. 376.

a direction to settle the conveyance,[4] or of a reference as to title;[5] of an omission in a decree in a creditor's suit of a direction to take the accounts of the personal estate;[6] of an allowance of interest from a different date from that determined in a master's report which the court had confirmed;[7] and of other minor defects or redundancies in respect to which a decree did not conform to the directions of the written opinion of the court.[8] It has been held that such a correction cannot be made in an appealable case after the term at which the decree was entered.[9] An order or decree entered by consent cannot be varied or modified in a material part without the assent of all the parties to the same; but the court, it seems, may give such further directions as are necessary to carry it "into effect, according to its spirit and intent."[10] The former English practice occasionally though rarely allowed similar corrections in what were manifestly mere clerical errors after a decree had been enrolled;[11] and in the Federal courts it has been said that an error in calculating the amount ordered by the decree to be paid may be corrected after enrolment, upon motion or petition, by entering a credit as for its payment.[12] Judgments have been set aside after the terms at which they were rendered where appearances had been made by attorneys without authority.[13] It has been held that the Federal courts can set aside, after the term at which it was rendered, a final judgment

[4] Trevelyan v. Charter, 9 Beav. 140.

[5] Hughes v. Jones, 26 Beav. 24.

[6] Pickard v. Mattheson, 7 Ves. 293.

[7] Fidelity Trust & Safe Deposit Co. v. Roanoke Iron Co., 84 Fed. R. 744.

[8] Gage v. Kellogg, 26 Fed. R. 242; Rogers v. Riessner, 34 Fed. R. 270; Tufts v. Tufts, 3 W. & M. 429; Pfanschmidt v. Kelly M. Co., 32 Fed. R. 667; Witters v. Sowles, 32 Fed. R. 765; Burdsall v. Curran, 31 Fed. R. 918; Albany v. Steam T. Co., 26 Fed. R. 318; Dorsheimer v. Rorback, 9 C. E. Green (N. J.), 33; Sprague v. Jones, 9 Paige (N. Y.), 395; Jarmon v. Wiswall, 9 C. E. Green (N. J.), 68. But see Ry. Reg. Mfg. Co. v. North Hudson Co. R. Co., 26 Fed. R. 411.

[9] Doe v. Waterloo Min. Co., 60 Fed. R. 643; Hicklin v. Marco, 64 Fed. R. 609.

[10] Walworth, C., in Leitch v. Cumpston, 4 Paige (N. Y.), 476; Gage v. Kellogg, 26 Fed. R. 242; Rogers v. Riessner, 34 Fed. R. 270.

[11] Weston v. Haggerston, G. Cooper, 134; Yow v. Townsend, 1 Dick. 59; Atty. Gen. v. Greenhill, 34 Beav. 174; Beekman v. Peck, 3 J. Ch. (N. Y.) 415; Clark v. Hall, 7 Paige (N. Y.), 382; Thompson v. Goulding, 5 Allen (Mass.), 81. For enrollment of decrees, see *supra*, § 325*b*.

[12] Massie v. Graham, 3 McLean, 41.

[13] After three years, in McGeorge v. Bigstone G. I. Co., 88 Fed. R. 599. After eleven years, Maury's Trustees v. Fitzwater, 88 Fed. R. 768.

or decree entered by a mistake of the judge without an examination of the pleadings and evidence;[14] one which the judge was induced to make by false representations as to its nature;[15] when the necessity for the correction and the matter from which it is to be made appear upon the face of the record;[16] when, according to the judge's recollection, it does not conform to his decision;[17] in which last two cases no notice of the application for the correction is required;[18] and whenever it can be shown, by evidence adduced *aliunde*, that the judgment does not represent the decision of the court.[19] But it has been held that the Circuit Courts, after the term at which they were rendered and the time allowed by the rules for an application for a rehearing has expired, have not the power to set aside decrees or judgments for errors of law.[20] A decree entered upon a mandate of the Supreme Court which fails in any respect to comply therewith is not final, and may be modified at a subsequent term.[21] It has been held that, after the term at which a decree has been entered, it may be modified as to the time or the manner of its enforcement.[22] A Federal court may vacate or correct its judgments or decrees on its own motion during the same term for any cause.[23]

§ 352. Petitions for a rehearing.— A petition for a rehearing is the proper method of correcting before enrolment errors in a decree which are not evidently clerical or accidental. A petition for a rehearing could formerly in England have only been made to a judge before whom the cause was heard, or to the Lord Chancellor.[1] In the Federal courts a petition for a rehearing will usually be entertained only by the judge or jus-

[14] U. S. v. Williams, 67 Fed. R. 884. Such an application should be addressed to the judge who made the error. If he is dead or has left the bench, another judge will rarely, if ever, grant it. Hicklin v. Marco, 64 Fed. R. 609.

[15] Fisher v. Simon, 67 Fed. R. 887.

[16] Odell v. Reynolds (C. C. A.), 70 Fed. R. 656.

[17] Ibid.

[18] Ibid.

[19] In such a case the application must be upon notice. Ibid.

[20] Klever v. Seawall (C. C. A.), 65 Fed. R. 873; McGregor v. Vt. L. & Tr. Co. (C. C. A.), 104 Fed. R. 709.

[21] Moran v. Hagerman (C. C. A.), 64 Fed. R. 499.

[22] Mootry v. Grayson (C. C. A.), 104 Fed. R. 613, 618; Farmers' L. & Tr. Co. v. Oregon Pac. R. Co., 28 Oreg. 44; s. c., 40 Pac. R. 1089; Monkhouse v. Corporation of Bedford, 17 Ves. 380.

[23] Ætna L. Ins. Co. v. Board of Co. Com'rs (C. C. A.), 79 Fed. R. 575.

§ 352. [1] Daniell's Ch. Pr. (5th Am. ed.) 1471.

tice before whom the cause was heard.[2] The rules provide that "No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court."[3] A petition filed within the time prescribed by the rules may be heard and granted subsequently.[4] When the respondent to a petition for a rehearing, at the hearing on the petition does not dispute the fact that the suit could not be appealed, he cannot, after a rehearing has been granted, offer new proof to show that an appeal might lie, and on that ground seek to reverse a decree rendered after a rehearing.[5]

A rehearing in England was formerly allowed almost as of course, upon the filing of a petition signed by two counsel, of whom one at least must have been concerned in the original hearing; the rule having been stated by Lord Hardwicke, that "such credit is given by the court to their opinion that the cause ought to be reheard, that it will, in general, order the cause to be set down" for that purpose, as a matter of course.[6] This rule, however, has not been adopted in the courts of the United States, where a rehearing is discretionary with the judge to whom the application is made.[7] Unless the judge acts of his own motion, a rehearing will be granted only for errors of law apparent upon the record and arising upon questions which were not argued at the original hearing, or upon newly discovered evidence of such a character that it would have authorized a new trial in an action at law.[8] A rehearing should

[2] Giant P. Co. v. California V. P. Co., 5 Fed. R. 197, 202.

[3] Rule 88. See McMicken v. Perrin, 18 How. 507; Bank of Lewisburg v. Sheffey, 140 U. S. 145; First Nat. Bank v. Woodrum, 86 Fed. R. 1004.

[4] Aspen M. & S. Co. v. Billings, 150 U. S. 31, 36; Goddard v. Ordway, 101 U. S. 745; New Orleans v. Fisher (C. C. A.), 91 Fed. R. 574, 585; Giant P. Co. v. California V. P. Co., 6 Fed. R. 197, 202. *Contra*, Glenn v. Noonan, 43 Fed. R. 403; s. c., 43 Fed. R. 550.

[5] Moelle v. Sherwood, 148 U. S. 21, 26.

[6] Cunyngham v. Cunyngham, Amb. 89. See Atty. Gen. v. Brooke, 18 Ves. 319, 325; East India Co. v. Boddam, 13 Ves. 421.

[7] Mr. Justice Field in Giant P. Co. v. California V. P. Co., 5 Fed. R. 197.

[8] Daniel v. Mitchell, 1 Story, 198; Jenkins v. Eldredge, 3 Story, 299; Emerson v. Davies, 1 W. & M. 21; Tufts v. Tufts, 3 W. & M. 426; Giant P. Co. v. California V. P. Co., 5 Fed. R. 197.

not be granted for newly discovered evidence where the evidence could have been obtained by reasonable diligence on the first hearing,[9] nor when it is merely cumulative to that previously received, nor when, if presented, it would not have changed the result.[10] "A new hearing should not be had simply to allow a rehash of old arguments."[11] "If rehearings are to be had, until the counsel on both sides are entirely satisfied, I fear, that suits would become immortal, and the decision be postponed indefinitely."[12] A rehearing can only take place for the purpose of altering a decree upon grounds which existed at the time when the decree was pronounced, and one will not be allowed to remedy a grievance consequent upon a decree resulting entirely from circumstances that have occurred subsequent to its entry.[13] The rules provide that "every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or some other person."[14] The petition for a rehearing should state fully the facts which show the nature of the new evidence, the facts which show that it could not have been found by the exercise of reasonable diligence before the hearing, that it was not known then and that a diligent search was previously made for the evidence; and mere general averments of reasonable

[9] Allis v. Stowell, 85 Fed. R. 481; McLeod v. New Albany (C. C. A.), 66 Fed. R. 378; In re Gamewell F. A. Tel. Co. (C. C. A.), 78 Fed. R. 908; Bennett v. Schooley, 77 Fed. R. 852.

[10] Giant P. Co. v. California V. P. Co., 5 Fed. R. 197, 201; Jenkins v. Eldredge, 3 Story, 299; Tufts v. Tufts, 3 W. & M. 426; Hicks v. Otto, 23 Blatchf. 122; Page v. Holmes B. A. Tel. Co., 2 Fed. R. 330; Collins Co. v. Coes, 8 Fed. R. 517; Witters v. Sowles, 31 Fed. R. 5; Pfanschmidt v. Kelly M. Co., 32 Fed. R. 667, and cases cited in the opinions in these cases. But see Webster Loom Co. v. Higgins, 43 Fed. R. 673. It has been said that a motion to open a decree in order to introduce new evidence differs from a motion for a rehearing, technically so called, and is not to be governed by the same stringent rules. "It is rather a motion addressed to the discretion of the court with reference to the order of trial." Campbell Pr. & Mfg. Co. v. Marden, 70 Fed. R. 339, 340.

[11] Field, J., in Giant P. Co. v. California V. P. Co., 5 Fed. R. 197, 201.

[12] Story, J., in Jenkins v. Eldredge, 3 Story, 299, 305.

[13] Bowyer v. Bright, 13 Price, 816; Hurlburd v. Freelove, 3 Wis. 537.

[14] Equity Rule 88; U. S. v. The Dago (C. C. A.), 63 Fed. R. 182. The return and affidavits should not be verified before a notary who is one of the petitioner's counsel. Allis v. Stowell, 85 Fed. R. 481.

diligence and previous ignorance are insufficient.[15] The allegations must be full, precise, and certain. It seems that they will be insufficient if sworn to merely upon information and belief.[16] It has been held that when evidence of new facts not already in issue is to be given, the petition should be accompanied by a supplemental bill in the nature of a bill of review, pleading these facts; in which case, if the petition be granted, the hearing upon that bill will take place at the same time as the rehearing of the original suit.[17] The usual proceedings to obtain a rehearing are for the party desiring it to file his petition in the clerk's office, and then to procure an order directing his opponent to show cause why his prayer should not be granted.[18] The adverse party may then answer, controverting or setting up new matter in avoidance of allegations in the petition; or probably may show cause against granting the rehearing on the return-day of the order by an affidavit.[19] If there be any irregularity in the petition, it may be taken off the file at the respondent's motion.[20] Upon the return-day of the order to show cause, if no adjournment be had, the matter is argued before the judge, by whose direction the decree or order complained of was made, unless he be absent, when the papers and the briefs of counsel should be filed with the clerk, who will mail them to him.[21] The petition will not be granted without notice to the adverse parties, and an opportunity for their presence afforded them.[22] A rule of the Circuit Court for the Southern District of New York provides that when a "motion for a rehearing is made during the term at which a decree has been rendered, the enrolling or recording of such decree shall be suspended until the final disposition of such motion by the court."[23] Upon a rehearing the cause or matter is proceeded in as if it were heard for the first time. All dep-

[15] Allis v. Stowell, 85 Fed. R. 481; Hicks v. Otto, 85 Fed. R. 728; McLeod v. New Albany (C. C. A.), 66 Fed. R. 378.

[16] Page v. Holmes B. A. Tel. Co., 2 Fed. R. 330.

[17] Baker v. Whiting, 1 Story, 218; Perry v. Phelips, 17 Ves. 173, 178; Head v. Godlee, Johns. 536, 579; Jopp v. Wood, 2 De G., J. & S. 323.

[18] Giant P. Co. v. California V. P. Co., 5 Fed. R. 197.

[19] Ibid.

[20] Wood v. Griffith, 1 Meriv. 35.

[21] Giant P. Co. v. California V. P. Co., 5 Fed. R. 195.

[22] Ibid., 197.

[23] U. S. C. C., S. D. N. Y., Rule 114.

ositions taken before the original hearing, though not then used, may be read,[24] and the plaintiff may withdraw from evidence any portion of the answer read before.[25] No new evidence can be used, unless a supplemental bill has been filed;[26] but exhibits not previously used may be produced;[27] and if a witness has since the former hearing been convicted of perjury,[28] or admitted receiving a bribe to influence his testimony,[29] that may be proved to the court. After one rehearing, a petition for another can only be filed by special leave of the court, and may be taken off the file if presented without such leave.[30] It has been held that an order granting a rehearing after the time prescribed by the rules has expired is void, not merely voidable; and that a party does not, by taking a subsequent step in the cause, waive his right to move to vacate the same.[31] The grant or refusal, absolute or conditional, of an application for a rehearing, which has been made in due time, rests in the discretion of the court where the cause is first heard, and is not a subject of appeal.[32] Affidavits presented in support of a motion for a rehearing which was denied, cannot be considered on an appeal from the final decree.[33]

§ 353. Supplemental bills in the nature of bills of review.— A supplemental bill in the nature of a bill of review is a bill that brings to the attention of the court new matter, which has arisen or been discovered since, and could not by the exercise of due diligence have been discovered before, the time for taking testimony in a cause expired, and which the party filing the bill alleges as a reason why a decree made and passed therein, but not signed and enrolled, should be reversed or modified.[1] Such a bill cannot be filed after a decree has

[24] Cunyngham v. Cunyngham, Amb. 89, 90.

[25] Allfrey v. Allfrey, 1 Macn. & G. 87; Ogle v. Morgan, 1 De G., M. & G. 359.

[26] Jenkins v. Eldredge, 3 Story, 299; *infra*, § 153.

[27] Herring v. Clobery, Cr. & Ph. 251.

[28] Needham v. Smith, 2 Vern. 463.

[29] Ibid.

[30] Moss v. Baldock, 1 Phila. 118.

[31] Glenn v. Lucas, 43 Fed. R. 550.

[32] Roemer v. Bernheim, 132 U. S. 103, 106; Buffington v. Harvey, 95 U. S. 99, 100; Steines v. Franklin County, 14 Wall. 15, 22; Railway Co. v. Heck, 102 U. S. 120; Kennon v. Gilmer, 131 U. S. 22, 24; Boesch v. Gräff, 133 U. S. 697, 699.

[33] Giles v. Heysinger, 150 U. S. 627, 631.

§ 353. [1] Perry v. Phelips, 17 Ves. 173; Mitford's Pl., ch. 1, § 2; Moore v. Moore, 2 Ves. Sen. 596; Story's Eq. Pl., §§ 422, 423.

been signed and enrolled.[2] The proper remedy in a similar case then is a bill of review.[3] A supplemental bill in the nature of a bill of review cannot be used to obtain a reversal or modification of a decree for errors in law apparent upon its face.[4] That, before enrolment, can only be done by means of a petition for a rehearing.[5] Matter of revivor and supplement may be incorporated in such a supplemental bill.[6] An English chancery order made on the 17th of October, 1841, and which should probably be followed here, the clerk taking the place of the registrar and five dollars being reckoned as a pound sterling, provides: "That no supplemental bill, or bill in the nature of a bill of review, grounded upon new matter discovered, or pretended to be discovered, since the pronouncing of any decree, of this court, in order to the reversing or varying of such decree shall be exhibited without the special leave of the court first obtained for that purpose, and unless the party exhibiting the same do first deposit with the registrar of this court so much money as together with the deposit by the rules of this court required to be made on obtaining a rehearing of the cause or causes wherein such decree was pronounced will make up the sum of 50*l.*, as a pledge to answer such costs and damages as shall be awarded to the adverse party, in case the court shall think fit to award any at the hearing of the cause on such supplemental or new bill."[7] A supplemental bill in the nature of a bill of review should state the facts which it is desired to prove, and, if they had then occurred, the reason why they were not discovered and given in evidence before publication, and it seems should state positively that the decree has not been enrolled, and not in the alternative, praying one sort of relief as upon a bill of review, if the decree has been enrolled, and if not enrolled, then to have the benefit of it as upon a supplemental bill in the nature of a bill of review.[8] Such a bill should conclude with a prayer that the cause may be reheard. It should be signed by counsel, and in other respects conform to the requirements of a bill of review upon

[2] Beames' Orders, 1.
[3] See §§ 354–356.
[4] Perry v. Phelips, 17 Ves. 173.
[5] See § 352.
[6] Perry v. Phelips, 17 Ves. 176–178.
[7] Order of 17th October, 1741; Beames' Orders, 368.
[8] Story's Eq. Pl., § 425. See the language of Lord Eldon in Perry v. Phelips, 17 Ves. 173–178.

newly discovered facts.[9] Like that, it can only be filed by leave of the court, which is obtained in the same way, and upon the same grounds as leave to file such a bill of review;[10] and the proceedings upon the two kinds of bills are also substantially the same.[11] But according to Lord Redesdale, "Bills in the nature of bills of review do not appear subject to any peculiar cause of demurrer, unless the decree sought to be reversed does not affect the interest of the person filing the bill."[12] Laches may be a ground for refusing leave to file a supplemental bill in the nature of a bill of review, unless such laches is extenuated by laches on the part of the defendant to it.[13] Such a bill cannot be heard unless accompanied by a petition for a rehearing, when the rehearing of the original and the hearing of the supplemental cause will be set down together.[14] Such a bill cannot be filed to set aside or to reopen an interlocutory order or decree.[15]

§ 354. Bills of review.— A bill of review is a bill filed to reverse or modify a decree that has been signed and enrolled for error in law apparent upon the face of such decree, or on account of new facts discovered since publication was passed in the original cause, and which could not by the exercise of due diligence have been discovered or used before the decree was made.[1] A bill of review can only be filed to impeach a final, not to impeach an interlocutory decree.[2] For an interlocutory decree can always be modified or reversed by the court without any bill for that purpose.[3] But the expression "final decree" is here used with the meaning given it when speaking of appeals.[4] The errors of law for which a decree may be reversed or modified must be clearly apparent upon the record,

[9] Story's Eq. Pl., §§ 422, 425; Bennett v. Schooley, 77 Fed. R. 852. See *infra*, § 355.

[10] Story's Eq. Pl., § 422.

[11] Story's Eq. Pl., §§ 422–425.

[12] Mitford's Pl., ch. 1, § 3, pt. 3.

[13] Story's Eq. Pl., § 423; Sheffield Canal Co. v. Sheffield & R. Ry. Co., 1 Phillips, 484.

[14] Moore v. Moore, 2 Ves. Sen. 596, 598; Perry v. Phelips, 17 Ves. 173.

[15] C. & A. Potts Co. v. Creager, 71 Fed. R. 574.

§ 354. [1] Mitford's Pl., ch. 1, § 3, pt. 3; Story's Eq. Pl., §§ 403–420; Irwin v. Meyrose, 7 Fed. R. 533; Nickle v. Stuart, 111 U. S. 776; Freeman v. Clay (C. C. A.), 52 Fed. R. 1.

[2] Jenkins v. Eldredge, 3 Story, 299; Story's Eq. Pl., § 408*a*.

[3] Story's Eq. Pl., § 408*a*. See *supra*, § 203.

[4] Story's Eq. Pl., § 408*a*; Whiting v. Bank of U. S., 13 Pet. 6, 15; Ray v. Law, 3 Cranch, 179; Jenkins v. Eldredge, 3 Story, 299.

that is, "only such as arose upon the pleadings, proceedings, and decree, without reference to the evidence in the cause;"[5] as, for example, the disregard of a statute,[6] or want of jurisdiction,[7] or the finding of a fact contrary to an allegation in a defendant's answer when no evidence was taken;[8] not errors in drawing conclusions from evidence,[9] nor errors in casting accounts,[10] nor it seems in matters of abatement,[11] nor in the exercise of discretion,[12] nor matters of form,[13] — among which, however, the omission of a clause giving an infant defendant a day in which to show cause against a decree is not included, and on that ground a bill of review may be sustained.[14] It has been held to be no sufficient ground for a bill of review that since the decree a State court has given to the Constitution of the State a construction different from that put upon it by the Federal court in its decree;[15] nor that since the decree the Supreme Court has changed its ruling upon a question of law or fact.[16] In England, where the mandatory part of a decree was usually preceded by a statement of the facts upon which it was founded, only the decree itself could be examined for such errors;[17] but in the Federal courts where this custom does not exist, the whole record except the evidence may be thus corrected.[18] Bills of review for errors apparent upon the record can only be filed within the time limited for

[5] Bradley, J., in Buffington v. Harvey, 95 U. S. 99. See also Whiting v. Bank of U. S., 13 Pet. 6; Putnam v. Day, 22 Wall. 60; Thompson v. Maxwell, 95 U. S. 391.

[6] Story's Eq. Pl., § 405; Gregor v. Molesworth, 2 Ves. Sen. 109.

[7] Ketchum v. Farmers' L. & T. Co., 4 McLean, 1; Miller v. Clark, 47 Fed. R. 850; s. c., 52 Fed. R. 900.

[8] Clark v. Killian, 103 U. S. 766.

[9] Whiting v. Bank of U. S., 13 Pet. 6; Dexter v. Arnold, 5 Mason, 303; Putnam v. Day, 22 Wall. 60; Buffington v. Harvey, 95 U. S. 99; Kimberley v. Arms, 40 Fed. R. 548; s. c., 136 U. S. 629; Jourolmon v. Ewing, 85 Fed. R. 103.

[10] Massie v. Graham, 8 McLean, 41; Beames' Ord. 1; Story's Eq. Pl., § 405.

[11] Story's Eq. Pl., § 411; Hartwell v. Townsend, 6 Bro. Parl. R. 107; Slingsby v. Hale, 1 Ch. Cas. 122.

[12] Buffington v. Harvey, 95 U. S. 99; Irwin v. Meyrose, 7 Fed. R. 583.

[13] Story's Eq. Pl., § 411.

[14] Story's Eq. Pl., § 407; Perry v. Phelips, 17 Ves. 178; Gregor v. Molesworth, 2 Ves. Sen. 109. See *supra*, § 322.

[15] King v. Dundee M. & Tr. I. Co., 28 Fed. R. 33; Hoffman v. Knox, 50 Fed. R. 484.

[16] Tilghman v. Werk, 39 Fed. R. 680.

[17] Story's Eq. Pl., § 407.

[18] Whiting v. Bank of U. S., 13 Pet. 6; Buffington v. Harvey, 95 U. S. 99; Clark v. Killian, 103 U. S. 766.

an appeal.[19] The time within which the control of the Circuit Court over the case is suspended by an appeal subsequently dismissed, is not included in the computation of time;[20] but the period between the entry of a void order vacating the order sought to be reviewed and the vacation of such void order is included.[21] Laches for a shorter period of time might be a ground for dismissing a bill of review.[22] After a decree has been affirmed by the appellate court, it cannot be reviewed for any reason without leave of that court;[23] even if the affirmance was by a divided court.[24] Leave to make such an application to the court below should be inserted in the mandate of the appellate court.[25] Leave will rarely, if ever, be granted then to file a bill of review for errors in law.[26] Leave of court is not needed to enable a party to file a bill of review for errors apparent upon the face of the record.[27] A bill defective as a bill of review may be sustained as a cross-bill.[28] It has been said that a bill of review is not in so far a contention of the original suit as to affect with notice of *lis pendens* a purchaser in good faith after a final decree and before the bill of review was filed or notice to the purchaser of an intention to

[19] Thomas v. Harvie's Heirs, 10 Wheat. 146; Kennedy v. Georgia State Bank, 8 How. 586; Clark v. Killian, 103 U. S. 766; Story's Eq. Pl., § 410. See also Massie v. Graham, 3 McLean, 41; McDonald v. Whitney, 89 Fed. R. 466; Rector v. Fitzgerald (C. C. A.), 59 Fed. R. 808.

[20] Ensminger v. Powers, 108 U. S. 292.

[21] Central Trust Co. v. Grant Locomotive Works, 135 U. S. 207.

[22] Farmers' Loan & Trust Co. v. Green Bay & M. R. Co., 16 Fed. R. 100, 113; Duncan v. Atlantic M. & O. R. Co., 88 Fed. R. 840.

[23] Southard v. Russell, 16 How. 547; Kingsbury v. Buckner, 134 U. S. 654; Kimberly v. Arms, 40 Fed. R. 548; s. c., 136 U. S. 629; Watson v. Stevens (C. C. A.), 58 Fed. R. 31; Franklin Savings Bank v. Taylor (C. C. A.), 58 Fed. R. 854; *infra*, § 355. But it has been held that a Circuit Court may, without leave of the Supreme Court, entertain a bill to enjoin the enforcement of a judgment against the complainant upon a mandate of the Supreme Court on the ground that the complainant was not in fact a party to such judgment nor bound thereby. Brown v. Walker, 84 Fed. R. 532.

[24] Leslie v. Town of Urbana (C. C. A.), 56 Fed. R. 762.

[25] Watson v. Stevens (C. C. A.), 58 Fed. R. 31, 35. See also Society of Shakers v. Watson (C. C. A.), 77 Fed. R. 512.

[26] Southard v. Russell, 16 How. 547; Kingsburg v. Buckner, 134 U. S. 650, 671; Story's Eq. Pl., § 408.

[27] Ross v. Prentiss, 4 McLean, 106.

[28] Houghton v. West, 2 Bro. Parl. Rep. by Tomlins, 88; Story's Eq. Pl., § 401, n. 5.

inal cause,[8] provided that it be connected with the subject-matter of the bill.[9] A bill of review will not lie on the ground of newly discovered evidence which is merely cumulative, or goes to impeach the character of witnesses.[10] It has been held that a bill of review will not lie on the ground that a decree offered in evidence in the original suit and there held to be *res adjudicata* has since been set aside for want of jurisdiction, unless it is shown that the defect in the jurisdiction could not have been known or discovered by the exercise of reasonable diligence when the decree was offered in evidence.[11] It has been said that the matter upon the discovery of which a bill of review is based, if previously known to the other party, must be of such a nature that he was not in conscience obliged to have discovered it to the court; for if it was known to him and such as in conscience he ought to have discovered, he obtained the decree by fraud, and it ought to be set aside by an original bill.[12] Permission to file such a bill of review is always in the discretion of the court;[13] and lapse of time since the discovery of the new matter will always have great weight in inducing the court to look with disfavor upon an application for leave to file such a bill of review.[14] It has been said that if the decree impeached has been affirmed by an appellate court, such a bill of review can only be filed by leave of that court;[15] but in the absence of special circumstances such leave will be granted by the court of review, as of course.[16] A bill of review for newly discovered matter, if filed without leave, may upon motion be dismissed or taken off the file.[17]

§ 356. Provisions common to all bills of review.—"To entitle a person to bring a bill of review, it is necessary that he should have obeyed or performed the decree; as, if it be for

[8] Partridge v. Osborne, 6 Russ. 195.

[9] U. S. v. Sampeyreac, Hempst. 118.

[10] Southard v. Russell, 16 How. 547.

[11] Vetterlein v. Barker, 45 Fed. R. 74.

[12] Manaton v. Molesworth, 1 Eden, 18, 25. But see U. S. v. Sampeyreac, Hempst. 118; s. c. as Sampeyreac v. U. S., 7 Pet. 222; Bennett v. Schooley, 77 Fed. R. 352; Municipal S. Co. v. Gamewell F. A. Tel. Co., 77 Fed. R. 452.

[13] Beames' Orders, 1; Massie v. Graham, 3 McLean, 41; Story's Eq. Pl., §§ 404, 417.

[14] Blandy v. Griffith, 6 Fish. Pat. Cas. 484; Thomas v. Harvie, 10 Wheat. 146, 151; Tilghman v. Werk, 39 Fed. R. 680; Story's Eq. Pl., § 419.

[15] Southard v. Russell, 16 How. 547.

[16] Seymour v. White County (C. C. A.), 92 Fed. R. 115; *supra*, § 355.

[17] Carroll v. Parran, 1 Bland (Md.), 125, note.

land, that the possession be yielded; if it be for money, that the money be paid; if it be for evidences, that the evidences be brought in; and so in other cases which stand upon the strength of the decree alone. But if any act be decreed to be done, which extinguisheth the party's right at the common law, as making of assurance or release, acknowledging satisfaction, canceling bonds or evidences, and the like, those parts of the decree are to be spared until the bill of review be determined; but such sparing is to be warranted by public order made in court."[1] If, however, the plaintiff to the bill of review be insolvent,[2] or for any other reason it be impossible for him to obey the original decree;[3] or if he were directed to perform an act after the performance of another act by the other party, and that other have omitted to perform his part thereof;[4] or if the direction were to another defendant to the original decree and not to the party who files the bill of review;[5] or perhaps, if he have given security for its performance,[6]—his disobedience is no objection to the bill of review. By an English order in Chancery, made on March 12, 1700, it was ordered that for the future no bill of review should be allowed or admitted unless the party who preferred it first deposited the sum of £50 with the registrar of the court, as a pledge to answer such costs and damages as the court should award to the adverse party, in case it should think fit to dismiss the bill of review.[7] This order should probably be followed here, five dollars being reckoned as the equivalent of a pound sterling, and the money being deposited with the clerk of the court.[8] The court may, however, dispense with this requirement.[9] A decree entered by consent cannot be impeached by a bill of review.[10] A decree entered by consent can be set aside only

§ 356. [1] Daniell's Ch. Pr. (3d Am. ed.) 1634, 1635. See also Beames' Orders, 4; Massie v. Graham, 8 McLean, 41; Hoffman v. Knox, 50 Fed. R. 434. This rule applies even when it appears on the face of the former decree that the court had not jurisdiction of the subject-matter. Miller v. Clark, 47 Fed. R. 850.

[2] Davis v. Speiden, 104 U. S. 83.

[3] Story's Eq. Pl., § 406; Wiser v. Blachly, 2 J. Ch. (N. Y.) 488; Davis v. Speiden, 104 U. S. 83.

[4] Partridge v. Osborne, 5 Russ. 195, 251; Story's Eq. Pl., § 406.

[5] Hobbs v. State Tr. Co. (C. C. A.), 68 Fed. R. 618.

[6] Stallings v. Goodloe, 3 Murph. 159; Taylor v. Person, 2 Hawks (N. C.), 298.

[7] Beames' Orders, 313; Anon., 2 P. Wms. 283.

[8] Davis v. Speiden, 104 U. S. 83.

[9] Ibid.

[10] Thompson v. Maxwell, 95 U. S. 391.

by an original bill alleging fraud or surprise.[11] It is no objection to a bill of review that the party filing it has entered and procured the enrolment of the decree; "because," said Lord Nottingham, "he can have no error till it be enrolled, and perhaps the defendant will never enroll it;"[12] and a party may file a bill of review to a decree entirely in his favor, claiming that it is less beneficial to him than it should have been.[13] If upon a bill of review a former decree has been reversed, another bill of review may be brought to reverse the decree of reversal;[14] but after a bill of review has been dismissed upon demurrer or otherwise, no second bill of review will be allowed to be filed.[15] It has been held that a bill of review cannot be filed pending an appeal, although the plaintiff alleges that he does not intend to perfect his appeal.[16] No person can file a bill of review except a party who has been aggrieved by the decree complained of,[17] or the assignee by operation of law of such a party.[18] "If a bondholder not a party to the suit can, under any circumstances, bring a bill of review, he can only have such relief as the trustee would be entitled to in the same form of proceeding. To avoid what the trustee has done in his behalf, he must proceed in some other way by a bill of review."[19] All the parties to the original decree should be joined either as plaintiffs or as defendants to the bill of review.[20] It is doubtful whether a purchaser from the successful party to the decree can be made a defendant to a bill of review.[21] Lord Redesdale gives the following rules for the framing of a bill of review: "In a bill of this nature it is necessary to state the former bill, and the proceedings thereon; the decree, and the point in which the party exhibiting the bill of review conceives himself aggrieved by it; and the ground of law, or new matter discov-

[11] Gilbert v. Endean, 9 Ch. D. 259, 266. See *infra*, § 355.

[12] Cook v. Bamfield, 3 Swanst. 607.

[13] Cook v. Bamfield, 3 Swanst. 607; Dexter v. Arnold, 5 Mason, 303.

[14] Mitford's Pl., ch. 1, § 3; Stafford v. Bryan, 2 Paige (N. Y.), 45.

[15] Pitt v. Earl of Arglass, 1 Vern. 441; Dunn v. Filmore, 1 Vern. 135.

[16] Kimberly v. Arms, 40 Fed. R. 545, 550; s. c., 136 U. S. 629; Willian v. Willian, 16 Ves. 72, 87.

[17] Whiting v. Bank of U. S., 13 Pet. 6; Thompson v. Maxwell, 95 U. S. 391. But see King v. Dundee M. & Tr. I. Co., 28 Fed. R. 33.

[18] Story's Eq. Pl., § 409; Thompson v. Maxwell, 95 U. S. 391.

[19] Waite, C. J., in Shaw v. Railroad Co., 100 U. S. 605, 611.

[20] Bank of U. S. v. White, 8 Pet. 262.

[21] Rector v. Fitzgerald, 59 Fed. R. 808.

ered upon which he seeks to impeach it; and if the decree is impeached on the latter ground, it seems necessary to state in the bill the leave obtained to file it and the fact of the discovery, though it may be doubted whether after leave given to file the bill that fact is traversable.[23] The bill may pray simply that the decree may be reviewed and reversed in the point complained of, if it has not been carried into execution. If it has been carried into execution, the bill may also pray the farther decree of the court, to put the party complaining of the former decree into the situation in which he would have been if that decree had not been executed. If the bill is brought to review the reversal of a former decree, it may pray that the original decree may stand. The bill may also, if the original suit has become abated, be at the same time a bill of revivor. A supplemental bill may likewise be added, if any event has happened which requires it; and particularly if any person not a party in the original suit becomes interested in the subject he must be made a party to the bill of review by way of supplement."[23]

The plaintiff, however, cannot put his case in the alternative, as a bill of review, or, if the court shall think it not good as such, then as a bill of revivor and supplement.[24] It is improper for a bill of review on account of errors of law to contain a statement of the evidence in the original cause.[25] A bill of review which seeks relief because the original decree was erroneous for errors of law appearing on its face, and because of the discovery of new facts, and because of fraud, has been held multifarious.[26] A bill of review should be signed by counsel, and otherwise conform in general to the requirements of an original bill.[27] If the court had jurisdiction of the original suit, it can take jurisdiction of the bill of review, even though it would have none were the latter regarded as the beginning of a new suit.[28] It has been said that a Federal court cannot

[23] But see U. S. v. Sampeyreac, Hempst. 118; Dexter v. Arnold, 5 Mason, 303; Story's Eq. Pl., 420, note 7.

[23] Mitford's Pl., ch. 1, § 3, pt. 3. See also Whiting v. Bank of U. S., 13 Pet. 6.

[24] Perry v. Phelips, 17 Ves. 178.

[25] Buffington v. Harvey, 95 U. S. 99.

[26] Kimberly v. Arms, 40 Fed. R. 548, 559; s. c., 136 U. S. 629.

[27] Mitford's Pl., ch. 1, § 2, pt. 3.

[28] Oglesby v. Attrill, 12 Fed. R. 227. See § 21.

take cognizance of a bill of review to a decree of a State court.[29] The service and the appearance of a defendant to a bill of review is made and enforced in the same manner as to an original bill. But if the defendant be beyond the jurisdiction of the court, service of a subpœna upon his solicitor in the former suit may be allowed by the court.[30] The usual defense to a bill of review for errors apparent upon the face of the decree is by demurrer;[31] to which is usually joined a plea setting forth in full the original decree, although there seems to be no necessity for this practice.[32] If the demurrer is overruled, the decree is reversed or modified and the errors allowed, and no further answer or hearing is necessary.[33] If the demurrer is sustained, that has all the effect of confirming the decree, and puts an end to the suit.[34] The rule is in such a case only to vary the decree upon such errors as are complained of, except as to consequential directions, which will be altered to conform to the changes made.[35] If a bill of review for apparent error contain a statement of the evidence taken in the original cause, that may be stricken out of the bill as surplusage on motion;[36] or it may be a ground of demurrer, if specially assigned;[37] but the bill, if otherwise good, cannot be dismissed for that reason upon a general demurrer,[38] although such evidence or an allegation of an error of fact cannot on a general demurrer be used in support of the bill.[39] According to Lord Redesdale: "When any matter beyond the decree is to be offered against opening the enrolment, as length of time, that matter must be pleaded; otherwise the plaintiff will not have the benefit of exceptions, as infancy, coverture, or the like."[40] "A bill of review upon the discovery of new matter and a supplemental bill of the same nature being exhibited only by leave of the court, the ground of the bill is generally well considered before it is brought; and therefore in point of substance it can rarely be

[29] Bradley, J., in Barrow v. Hunton, 99 U. S. 80, 83.

[30] See *supra*, § 96.

[31] Mitford's Pl., ch. 2, § 2, pt. 1, 5.

[32] Ibid.

[33] Cook v. Bamfield, 3 Swanst. 607.

[34] Webb v. Pell, 3 Paige (N. Y.), 368.

[35] Moore v. Moore, 2 Ves. Sen. 596, 598.

[36] Bradley, J., in Buffington v. Harvey, 95 U. S. 99.

[37] Buffington v. Harvey, 95 U. S. 99.

[38] Ibid.

[39] Shelton v. Van Kleeck, 106 U. S. 532.

[40] Mitford's Pl., ch. 2, § 2, pt. 2.

liable to a demurrer. But if brought upon new matter, and the defendant should think that matter not relevant, probably he might take advantage of it by way of demurrer, although the relevancy ought be considered at the time leave is given to bring the bill."[41] If a demurrer to such a bill of review or supplemental bill be overruled, it does not dispose of the cause; and the defendant must answer, because fact is at issue.[42] If the demurrer is allowed, however, the suit is at an end.[43] The defendant may, it seems, traverse, and attempt to disprove, the allegations concerning the discovery of the new facts.[44] Upon the argument of the demurrer, nothing can be read except the bill of review and the decree,[45] and, in the Federal courts, the record[46] in the original suit; but, after the demurrer has been overruled, the plaintiff is at liberty to read any evidence that was submitted therein, as at a rehearing, the cause being then equally open.[47] Filing a bill of review does not prevent the execution of the decree impeached.[48] The court has power, when sustaining such a bill, to set aside a conveyance made in pursuance of the decree.[49] Where an appeal from the original decree has been taken and dismissed with costs, the cause will not be erased from the docket by a decree sustaining a bill of review for want of jurisdiction; and in such a case the court will not usually order a restitution of the costs of the original cause in the Circuit and appellate courts paid by the plaintiff to the bill of review.[50]

§ 357. Bills in the nature of bills of review.—As has been said above,[1] only parties to the decree impeached or their privies by operation of law, as heirs, executors, or administrators, are entitled to file a bill of review; but other persons in interest and in privity of estate, who are aggrieved by the decree, can have the same relief by means of a bill in the nature of a bill of review.[2] Such are assignees, devisees, and remaindermen of the

[41] Mitford's Pl., ch. 2, § 2, pt. 2.
[42] Cook v. Bamfield, 3 Swanst. 607.
[43] Mitford's Pl., ch. 2, § 2, pt. 2.
[44] Dexter v. Arnold, 5 Mason, 303; U. S. v. Sampeyreac, Hempst. 118; Story's Eq. Pl., § 420, n. 7.
[45] Catterall v. Purchase, 1 Atk. 290.
[46] Whiting v. Bank of U. S., 13 Pet. 13; Story's Eq. Pl., § 407.
[47] Catterall v. Purchase, 1 Atk. 290.
[48] Williams v. Mellish, 1 Vern. 117, n.
[49] Bank of U. S. v. Ritchie, 8 Pet. 128.
[50] Miller v. Clark, 52 Fed. R. 900. See Washington Bridge Co. v. Stewart, 3 How. 413.

§ 357. [1] See § 356, *supra*.
[2] Story's Eq. Pl., § 409.

original unsuccessful parties.[3] Lord Redesdale also speaks as follows concerning such a bill: "If a decree is made against a person who has no interest at all in the matter in dispute, or had not such an interest as was sufficient to render the decree against him binding upon some person claiming the same or a similar interest, relief may be obtained against error in the decree by a bill in the nature of a bill of review. Thus, if a decree is made against a tenant for life only, a remainderman in tail, or in fee, cannot defeat the proceedings against the tenant for life, but by a bill, showing the error in the decree, the incompetency in the tenant for life to sustain the suit, and the accruer of his own interest, and thereupon praying that the proceedings in the original cause may be reviewed, and for that purpose that the other party may appear to and answer this new bill, and that the rights of the parties may be properly ascertained. A bill of this nature, as it does not seek to alter a decree made against the plaintiff himself, or against any person under whom he claims, may be filed without the leave of the court."[4] Otherwise, the frame of and proceedings under bills in the nature of bills of review are substantially the same as those relating to bills of review.

§ 358. **Bills to impeach decrees on account of fraud.**— "If a decree has been obtained by fraud, it may be impeached by original bill without the leave of the court; the fraud used in obtaining the decree being the principal point in issue, and necessary to be established by proof before the propriety of the decree can be investigated. And where a decree has been so obtained the court will restore the parties to their former situation, whatever their rights may be."[1] Such a bill has been called an original bill in the nature of a bill of review.[2] There are dicta stating that a decree obtained by fraud may be set aside upon petition;[3] but it was finally settled that after enrolment a decree could only be impeached for this account by an

[3] Story's Eq. Pl., § 409; Whiting v. Bank of U. S., 13 Pet. 6; Singleton v. Singleton, 8 B. Monr. (Ky.) 340; Turner v. Berry, 38 Ill. 541.

[4] Mitford's Pl., ch. 1, § 2, pt. 3.

§ 358. [1] Mitford's Pl., ch. 1, § 2, pt. 3. See also Story's Eq. Pl., § 426; Richmond v. Tayleur, 1 P. Wms. 734; Barnesle v. Powell, 1 Ves. Sen. 120; Evans v. Bacon, 90 Mass. 213; Pacific R. of Mo. v. Mo. Pac. Ry. Co., 111 U. S. 505.

[2] Mussel v. Morgan, 3 Bro. Ch. R. 74, 79; Story's Eq. Pl., § 426.

[3] Sheldon v. Fortescue Aland, 3 P. Wms. 104, 111; Story's Eq. Pl., § 426.

original bill.[4] This is the only manner in which a decree entered by consent can be impeached.[5] Decrees entered by collusion,[6] or surprise,[7] may also be rectified in this manner. Certain other cases, although if logical arrangement solely were considered they should be considered under other heads, yet as they are usually spoken of in this connection by the books, may be here referred to. Lord Redesdale uses the following language, which has been copied by all subsequent text-writers: "Besides cases of direct fraud in obtaining a decree, it seems to have been considered, that where a decree has been made against a trustee, the *cestui que trust* not being before the court and the trust not discovered; or against a person who has made some conveyance or incumbrance not discovered; or when a decree has been made in favor of or against an heir, when the ancestor has in fact disposed by will of the subject-matter of the suit; the concealment of the trust or subsequent conveyance or incumbrance, or will, in these several cases, ought to be treated as a fraud. It has been also said that where an improper decree has been made against an infant, without actual fraud, it ought to be impeached by original bill."[8]

A bill to set aside a decree for fraud must state the decree, and the proceedings which led to it, with the circumstances of fraud on which it is impeached.[9] The bill will be demurrable if it fails to allege that the complainant thereto was misled to his prejudice by a fraudulent representation or suppression of which he complains.[10] All the parties to the original suit or their representatives should be joined as parties to it.[11] Such

[4] Mussel v. Morgan, 3 Bro. Ch. R. 74, 79; Bennett v. Hamill, 2 Sch. & Lefr. 566, 576; Story's Eq. Pl., § 426.

[5] Buck v. Fawcett, 3 P. Wms. 242; Davenport v. Stafford, 8 Beav. 503; Gilbert v. Endean, L. R. 9 Ch. D. 259; Seton on Decrees (4th ed.), 1536.

[6] Buck v. Fawcett, 3 P. Wms. 242; Story's Eq. Pl., §§ 426, 428.

[7] Stevens v. Guppy, 1 Turn. & Rus. 178.

[8] Mitford's Pl., ch. 1, § 2, pt. 3. Upon a bill to set aside a judgment for mistake, stronger proof of freedom from negligence is required than upon a motion for a new trial. Village of Cellina v. Eastport Sav. Bank Co. (C. C. A.), 68 Fed. R. 401. It has been said that when a motion for a new trial and a petition for a rehearing have been denied, equity will not entertain a bill to set aside a judgment on the same ground as that alleged in such motion and petition. Hendrickson v. Bradley (C. C. A.), 85 Fed. R. 508.

[9] Mitford's Pl., ch. 2, § 1, pt. 3; Story's Eq. Pl., § 476.

[10] Massachusetts Ben. L. Ass'n v. Lohmiller (C. C. A.), 74 Fed. R. 23.

[11] Harwood v. Railroad Co., 17 Wall. 78.

a bill may be filed in the court of first instance to enjoin the enforcement of a judgment after a mandate of affirmance has been remitted to it by a court of review,[12] and to enjoin an officer of the appellate court from enforcing a decree of reversal and sale when such decree was procured from the court of review by fraud.[13] A bill to set aside a judgment or decree of a State court on account of fraud may be filed in a Federal court,[14] and if originally filed in a State court, may be removed to a Federal court, when the requisite difference of citizenship exists.[15] A bill to set aside the decree of a Federal court on account of fraud may be filed in a Federal court irrespective of the citizenship of the parties.[16] Although such a bill is ancillary to the former suit in the same court, upon demurrer thereto judicial notice will not be taken of any matters in the former suit not set forth in the new bill, unless, perhaps, when it is filed by a party to the former suit.[17] A judgment of a Federal court entered after personal service upon the defendant cannot be set aside by an original bill after the time to file a bill of review has expired, because the record does not show the jurisdictional difference of citizenship.[18] A bill defective as a bill to set aside a decree for fraud might perhaps be sustained as a bill of review for matters apparent upon the record, but not unless filed within the time allowed for an appeal.[19] Upon an application for leave to file a bill of review for matters of fact newly discovered which were insufficient to support the bill, the court refused to separate from such allegations other allegations of fraud in obtaining the original decree, and to permit the bill to be filed as a bill to set aside the decree for fraud.[20] A bill to set aside a decree for fraud must show a valid and meritorious defense to the original decree.[21]

[12] Nelson v. First Nat. Bank, 70 Fed. R. 526.

[13] Carver v. Jarvis-Conklin M. Tr. Co., 73 Fed. R. 9.

[14] Gaines v. Fuentes, 92 U. S. 10; Barrow v. Hunton, 99 U. S. 80; Johnson v. Waters, 111 U. S. 640; Arrowsmith v. Gleason, 129 U. S. 86, 101. But see Nougue v. Clapp, 101 U. S. 551; Graham v. Boston, H. & E. R. Co., 118 U. S. 161, 177.

[15] Marshall v. Holmes, 141 U. S. 589. See *supra*, § 21.

[16] Pacific R. of Mo. v. Mo. Pac. Ry. Co., 111 U. S. 585; *supra*, § 21.

[17] Richardson v. Loree, 94 Fed. R. 875. But see *supra*, § 264.

[18] Donham v. Springfield H. Co., 62 Fed. R. 110.

[19] Dunlevy v. Dunlevy, 38 Fed. R. 462. See *supra*, § 354.

[20] Kimberly v. Arms, 40 Fed. R. 548, 558; s. c., 136 U. S. 629.

[21] Kimberly v. Arms, 40 Fed. R. 548; s. c., 136 U. S. 629.

§ 359. Bills to suspend or avoid the operation of decrees or judgments.— Lord Redesdale speaks as follows concerning bills to suspend the operation of decrees: "The operation of a decree signed and enrolled has been suspended on special circumstances, or avoided by matter subsequent to the decree, upon a new bill for that purpose. Thus during the troubles after the death of Charles the First, upon a decree for a foreclosure in case of non-payment of principal, interest, and costs due on a mortgage, the mortgagor at the time of payment being forced to leave the kingdom to avoid the consequences of his engagements with the royal party, and having requested the mortgagee to sell the estate to the best advantage and pay himself, which the mortgagee appeared to have acquiesced in; the court upon a new bill enlarged the time for performance of the decree, upon the ground of the inevitable necessity which prevented the mortgagor from complying with the strict terms of it, and also made a new decree on the ground of the matter subsequent to the former decree."[1] "The embarrassments occasioned by the civil war in the reign of Charles I., and the state of affairs after his death, before the restoration of Charles II., occasioned many extraordinary applications to the court of Chancery for relief, and perhaps induced the court to go far in extending relief; but there were many cases of extreme hardship, in which it was deemed impossible, consistently with established principles, to give relief; and all cases determined soon after the restoration, upon circumstances connected with the prior disturbed state of the country, ought to be considered with much caution."[2] No instance is known of the maintenance of such a bill in a Federal court. In a few cases the Federal courts have sustained bills to suspend the operation and enjoin the enforcement of judgments at law for matters subsequent.[3]

§ 359. [1] Mitford's Pl., ch. 1, § 2, pt. 3; Cooker v. Bevis, 1 Ch. Cas. 61; and also referring to Venables v. Foyle, 1 Ch. Cas. 2; Whorewood v. Whorewood, 1 Ch. Cas. 250; Wakelin v. Walthal, 2 Ch. Cas. 8.

[2] Mitford's Pl., ch. 1, § 2, pt. 3.

[3] Johnson v. St. Louis, I. M. & S. Ry. Co., 141 U. S. 602, 610; Parker v. The Judges, 12 Wheat. 561. See Ballance v. Forsyth, 24 How. 183.

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